Motion to dismiss 10 Feb 2 1875 Judge Davis

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TRANSCRIPT OF RECORD Reversed

SUPREME COURT OF THE UNITED STATES

No. ~~330.~~ 104

Reversed

MYRA CLARK GAINES, PLAINTIFF IN ERROR,

Field

vs.

JOSEPH FUENTES ET AL.

Writ

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED NOVEMBER 8, 1873.

5 Blatchford 337-8

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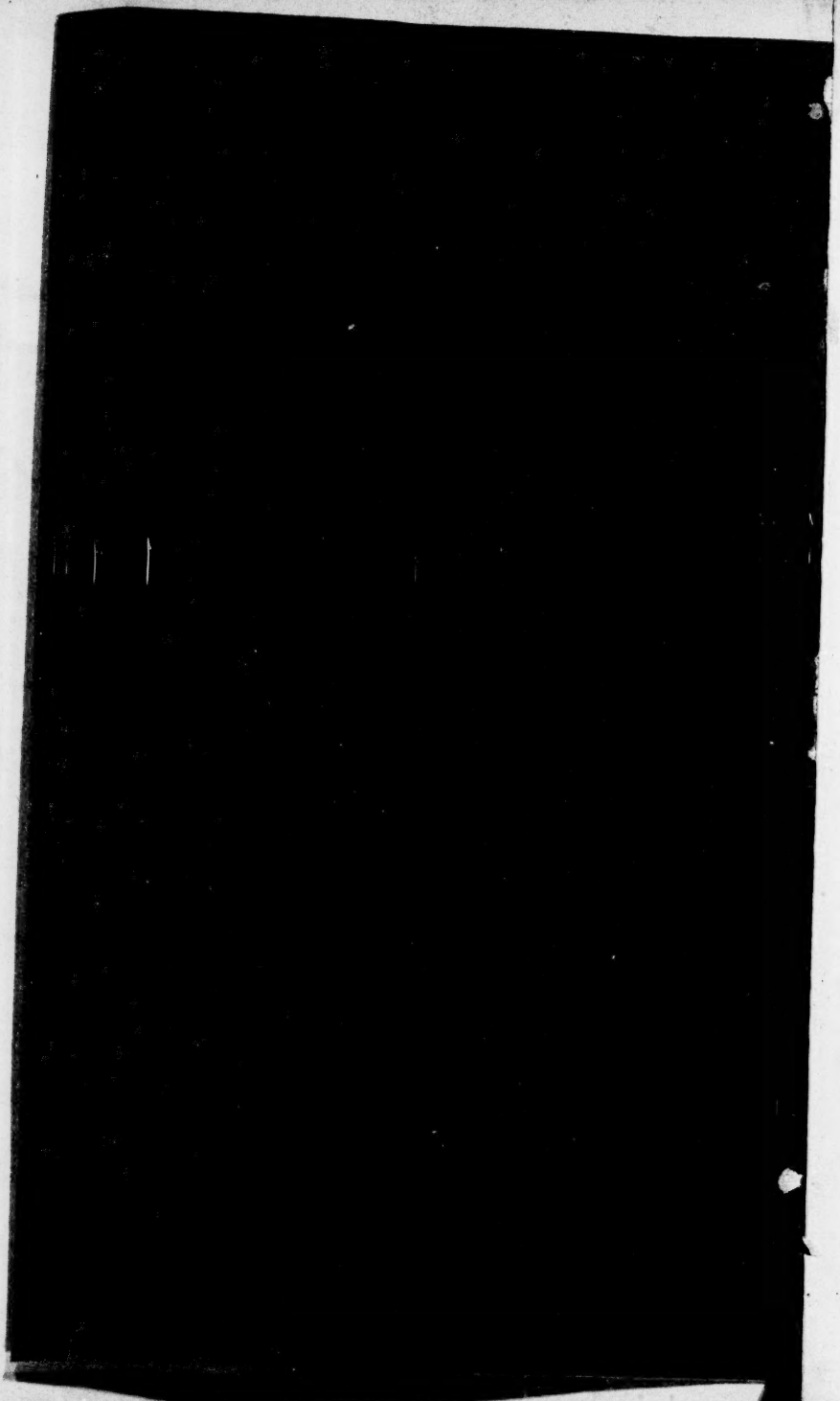

SUPREME COURT OF THE UNITED STATES.

No. 330.

MYRA CLARK GAINES, PLAINTIFF IN ERROR,

vs.

JOSEPH FUENTES ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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a Supreme court of Louisiana.

Filed February 5th, 1872.
(Signed) M. P. JULIAN,
Depy. Clerk.

Second district court for the parish of Orleans.

JOS. FUENTES & ALII, APPELLEES,
vs.
MYRA CLARK GAINES, APPELLANT. } 3700.

Miles Taylor & J. McConnell, esqrs., for appellees; Fellows & Mills, Race, Foster & E. T. Merrick, for appellant.

b STATE OF LOUISIANA:

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. APPELLEES,
vs.
MYRA C. GAINES, APPELLANT. } No. 32979.

M. Taylor & J. McConnell, for appellees; Fellows & Mills, & Race, Foster & E. T. Merrick, for appellant.

1 STATE OF LOUISIANA:

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

Petition.—Filed May 27th, 1869.

To the honorable Louis Duvigneaud, judge of the second district court for the parish of Orleans:

The petition of Joseph Fuentes, Theodore Guyol, Jules Lapene, Marcelin Esnard, D. B. Macarty, P. O. Peyroux, Owen Doherty, Albin Soulié, Florville Foy, G. Levasseur, M. A. Lavasseur, M. Meilleur, F. M. Jacobs, P. Avril, Francis Mouny, N. Rilleux, Mrs. E. Vance; Alfred Rousseau, testamentary executor of the estate of Rodolphe Rousseau; Mrs. S. Morel and her husband, O. Morel, herein aiding and assisting; Geo. Bischopp, Albin Rochereau, S. E. Brunet, J. A. Blanc, J. L.
2 Gubernator, François Lacroix, V. Demourelle, W. F. Vredenbergh; The City of New Orleans, a corporation created by the laws of the State of Louisiana; David Stickney, Ferdinand Thompson, Alphonse Drez; Mrs. Simeon Delord, herein authorized and assisted by her husband; Joseph Guillotte,, John Despeaux, J. Hoa, J. Hernandez, Jules Lavergne, Louis Mestier, J. Bermond, R. Rousselot, A. B. Griswold, R. J. Ker, J. B. Slawson, J. C. De St. Romes, P. H. Mousseaux, C. Morel, H. Larqué, B. Abadie, Pierre Minville, J. T. D. Lefebre, M. J. Lizardi, Raymond Carite, Casmir Carite, Jas. L. Swan, J. Dauphin, H. Dauphin, M. De Liano, T. Robertson, V. Baccas, P. Brunett, J. M.

Brunett, Willliam Creppell, P. Pesquier, R. Massana, N. Dabon, J. J. Lamoine, B. Abadie, M. Guena, A. Baumgarten, Pierre Sheny, N. Longue, J. François, wid. Geo. Perrilloux, Mellina Ross, all residents of the said city, respectfully represents:

That Myra Clark Gaines, a citizen of the State of New York, but at this time residing in the city of New Orleans, made application to
3 this honorable court on the 18th January, 1855, for the probate of an alleged last will of Daniel Clark, dated July 13th, 1813, and upon hearing did obtain, before the supreme court of this State, an order by which said pretended lost will, as set forth in the petition then filed, was recognized as the last will and testament of said decedent, Daniel Clark, and was ordered to be recorded and executed as such; which facts, with other necessary details, will appear from the record of the succession of the said decedent, Daniel Clark, No. on the docket of this court.

Now, petitioners aver that the said order or decree of probate was obtained ex parte, and by its terms authorized any person, at any time, who might desire so to do, to contest the said will and probate thereof, and show that no such will was executed, either in a direct action or as a means of defence by way of answer or exception, whenever the
4 said will should be set up as a muniment of title.

That the said Myra having thus obtained said order of probate of the said pretended will, did, on or about the 22d day of November, 1865, and subsequently thereto, institnte and bring against your petitioners, severally, the suits numbered 3663, 4006, & 4031, on the docket of the circuit court of the United States, fifth circuit and district of Louisiana, in which the said Myra set up the said pretended will of 1813, so probated, as a muniment of title, and under the same, as the instituted heir of said decedent, Daniel Clark, claimed, and now still demands from your petitioners sundry tracts of land and properties of great value, situated within this parish and elsewhere, and that the value of the interest of each of your petitioners in said property thus claimed largely exceeds the sum of five hundred dollars.

5 That your petitioners are informed that they are unable to contest the validity of the said pretended will of 1813 in the said circuit court on account of the peculiar jurisdiction thereof, so long as the said decree of probate remains unrecalled by this honorable court.

That after the said suits were brought against your petitioners by the said Myra in the said circuit court in the year 1865, and subsequently, as aforesaid, your petitioners did, in order to avoid unnecessary and expensive litigation, await the decision of the Supreme Court of the United States in certain cases then pending therein, which decision has now been rendered, declining to allow the defendants therein to contest in said United States courts the validity of said pretended will of 1813, and declaring that this honorable court, in which the said decree of probate was announced, was alone and exclu-
6 sively competent to question or entertain a suit for the recall and avoidance of the same.

Now your petitioners represent that the said probate of the said pretended will of July 13th, 1813, was a gross fraud upon the rights of these petitioners; that the said pretended will never existed; that the evidence and testimony of the witnesses, upon which the same was admitted to probate, was false or erroneous, illegal, and insufficient; that if any will was made by the said Daniel Clark, at any time other than the one admitted to probate and ordered to be executed by a decree of this court, dated on the 17th day of August, 1813, which is expressly de-

nied, it was destroyed or suppressed by the said Daniel Clark himself; that the said Daniel Clark left no will whatever posterior to that dated May 20th, 1811, which was probated, as above stated, in this court August 17th, 1813, and by which Mrs. Mary Clark, who was his
7 mother, and his sole and legal heir, was instituted his universal legatee, and which probate and will remained in force nearly half a century as the basis of title to the property of his succession.

And your petitioners further represent that the said Daniel Clark was never married and had no legitimate child; that he did not recognize the said Myra as his legitimate and only child, as is set forth in the said pretended will of 1813, but on the contrary, he, the said Clark, actually made ample provision for her as his illegitimate child by secret and confidential trusts, whereby he left property for her in the custody of her friends, which trusts have been duly executed, she having received the property thus left to her; that the said Daniel Clark did not make and could not have made a will in favor of the said Myra, because of her status; she, being the issue of an
8 adulterous connection, was without the legal capacity of inheriting or receiving by last will from the said Clark.

Whereupon your petitioners pray that the said Myra Clark Gaines may be cited according to law to answer this petition, and, after legal process had, judgment may be rendered revoking the said pretended will of July 13th, 1813, and recalling the said decree of probate thereof as absolutely void and of no effect in law. And your petitioners pray for all other aid, relief, & remedy the nature of the case may require and that may pertain to law & equity, &c.

(Signed) MILES TAYLOR,
" J. McCONNELL,
Of Counsel for Petitioners.

Citation.

STATE OF LOUISIANA:

Second district court for the parish of Orleans, in the city of New Orleans.

9 JOS. FUENTES & AL. *vs.* MRS. MYRA CLARK GAINES. } No. 32979.

Mrs. Myra Clark Gaines, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court for the parish of Orleans in ten days after the service hereof.

Witness the honorable L's Duvigneaud, judge of the said court, the 31st day of May, in the year of our Lord 1869.

(Signed) M. O. TRACY, *Clerk.*

Sheriff' return on above citation.

Received May 31st, 1869, and on the second day of June, 1869, served a duplicate of this citation, together with a true copy of the accompanying petition on Mrs. Myra Clark Gaines, defendant, personally.

Returned same day.

(Signed) JAS. BOUDET, *D'y Sheriff.*

10 *Petition & affidavit for transfer of suit.—Filed June 8th, 1869.*

JOSEPH FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

To the honorable the said second district court for the parish of Orleans:

The petition of Myra Clark Gaines, a citizen of the State of New York, respectfully represents:

That petitioner is a citizen of the State of New York, and that Joseph Fuentes & other plaintiffs in the above entitled and numbered cause are citizens of the State of Louisiana, and that the matter in dispute in said cause exceeds the sum and value of five hundred dollars, exclusive of costs.

That petitioner desires, as she is informed is her right, to have said cause removed for trial to the next term of the circuit court of
11 the United States, to be held in the fifth circuit and district of Louisiana, and she desires said removal.

Wherefore, petitioner prays, the premises, annexed affidavit, & bond considered, that said surety be accepted, and said cause be ordered to be removed from this honorable court to the said circuit court of the United States for the fifth circuit & district of Louisiana, at its next session; for all orders & general relief in the premises.

For petitioner,
(Signed) RACE, FOSTER, & E. T. MERRICK.
" FELLOWS & MILLS.

Affidavit annexed to foregoing petition.

Myra Clark Gaines being duly sworn says that all and singular, the allegations in the foregoing petition are true.
(Signed) MYRA CLARK GAINES.

Sworn to & subscribed before me this 7th day of June, 1869.
(Signed) A. SHELLY,
2d Justice Peace.

12 *Bond for removal of cause annexed to foregoiug petition.*

Know all men by these presents, that we, Myra Clark Gaines, a citizen of the State of New York, as principal, and C. Carite, of the city of New Orleans, as surety, are held and firmly bound unto Joseph Fuentes, Theodore Guyol, Jules Lapene, Marcelin Esnard, D. B. Macarty, P. O. Peyroux, O. Doherty, Albin Soulié, Florville Foy, G. Levasseur, M. A. Levasseur, M. Milleur, F. M. Jacobs, P. Avril, Francis Mouny, N. Rilleux, Mrs. E. Fance; A. Rousseau, testamentary executor of the estate of Rodolphe Rousseau; Mrs. S. Morel & her husband; George G. Renike, J. Sauvage, S. Magner, George Bischopp, Albin Rochereau, S. E. Brunett, J. A. Blanc, J. L. Gubernator, François Lacroix, V. Demouvelle, W. F. Vredenburgh; The City of New Orleans, a corporation created by the laws of the State of Louisiana; David Stickney, Ferdinand Thompson, Alphonse Drez, Mrs. Simeon Delord and her husband; Joseph Guillotte, John

13 Despeaux, J. Hoa, J. Hernandez, Jules Lavergne, Louis Mestier, J. Bermond, R. Rousselot, A. B. Griswold, R. J. Ker, J. B. Slawson, J. C. de St. Romes, P. H. Mousseaux, C. Morel, H. Larque, B. Abadie, Pierre Minville, J. T. D. Lefevre, M. J. Lizardi, Raymond Carite, Casimir Carite, James L. Leveau, J. Dauphine, H. Dauphine, M. de Llano, T. Robertson, V. Baccas, P. Brunett, J. M. Brunett, Wm. Creppell. P. Pesquier, R. Massana, N. Dabon, J. J. Lamoine, B. Abadie, M. Gueno, A. Baumgarden, Pierre Thierry, N. Louque, J. François, Widow George Perilleux, and Melina Ross, and to the judge of the second district court for the parish of Orleans, and to all other parties in interest, in the sum of five hundred dollars, for the payment of which, we bind ouselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated in the city of New Orleans, on this eight' day of June, 1869.

Whereas the above bounden Myra Clark Gaines has this day filed a petition to have removed from the second district court for the
14 parish of Orleans to the next circuit court of the United States for the fifth circuit and district of Louisiana the certain suit pending in said second district court for the parish ot Orleans and entitled & numbered Joseph Fuentes & als. vs. (No. 32979) Myra Clark Gaines:

Now the condition of thc above obligation is such, that if said Myra Clark Gaines shall enter in said circuit court on the first day of its next session, copies of said suit and process against her, this bond and obligation shall be null and void; otherwise to remain in full force and effect.

(Signed) MYRA CLARK GAINES.
C. CARITE.

Signed and executed in presence of—
WM. REED MILLS.

Order rendered on petition praying for removal of cause, &c.

Let Joseph Fuentes & als., petitioners in this cause, show cause, on Monday next, 14th instant, at eleven o'clock a. m. why the order
15 prayed for by defendant in this case should not be granted.

New Orleans, June 8th, 1869.

(Signed) L'S DUVIGNEAUD, *Judge.*

Citation.

STATE OF LOUISIANA:

Second district court for the parish of Orleans, in the city of New Orleans.

JOS. FUENTES ET AL.
vs. } No. 32979.
MYRA CLARK GAINES.

Mr. Jsoeph Fuentes & als., (through their attorneys, J. McConnell & Miles Taylor.)

Your are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable L's Duvigneaud, judge of the said court, the eighth day of June, in the year of our Lord 1869.

(Signed) M. O. TRACY, *Clerk.*

16 *Sheriff's return on foregoing citation.*

Received June 9th, 1869, and, on the 10th day of same month and year, served copy of the within citation and accompanying petition on Joseph Fuentes & als., plaintiffs herein, by personal service on Jas. McConnell, their attorney, who accepted the service.

Returned same day.

(Signed) H. F. LYND, *Dy. Sheriff.*

Answer of plaintiffs to order of court to show cause.—Filed June 14th, 1869.

Second district court, parish of Orleans.

JOSEPH FUENTES ET AL. *vs.* MYRA CLARK GAINES. } No. 32979.

The said plaintiffs by their counsel, in obedience to the order of this honorable court, directing them to shew cause why the order asked for by defendant to remove this cause to the United States circuit court, now come, and object to the granting of said order for the re
17 moval prayed for upon the following grounds:

First. That this cause is one of which this court has exclusive jurisdiction, and is not one in which the right to remove can be exercised.

Second. That the cause is one over which the United States courts can exercise no jurisdiction, as is apparent from the face of the record herein. And that it in consequence cannot be removed to the circuit court of the United States, as the act of removal would be a vain thing, and the cause would have to be remanded to this court for final adjudication.

Order rule continued, as entered in the minutes of June 14th, 1869.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32969.

The rule taken herein came up this day for trial—present: Fellows & Mills, and Race, Foster & E. T. Merrick for plff. in rule; J. McConnell & Miles Taylor for defendants therein—when, after
18 hearing part of the argument of counsel, the matter is continued until to-morrow, at eleven o'clock a. m.

Order rule continued, as entered in the minutes of June 15th, 1869.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

The rule to show cause why the order asked for by the defendant to

remove this cause to the United circuit court should not be granted, came up this day as per continuance from yesterday—present: Fellows & Mills & Race, Foster & E. T. Merrick for plaintiff in rule; J. McConnell & Miles Taylor for defendants therein—when, after further argument heard, and the hour for trial of rules having expired, the matter, by consent of counsel, is continued until Friday next,
19 the 18th instant, at eleven o'clock a. m.

Order rule continued, as entered in the minutes of June 18th, 1869.

Second district court for the parish of Orleans.

JOSEPH FUENTES ET ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

This case is ordered to be continued to Thursday next, the 24th instant, at eleven o'clock a. m., counsel on both sides being present in open court.

Order fixing rule, as entered in the minutes of June 28th, 1869.

Second district court for the parish of Orleans.

JOS. FUENTES & AL.
vs.
MRS. MYRA C. GAINES. } No. 32979.

On motion of John McConnell, one of the counsel for plffs.—
It is ordered that this case, on the petition praying for transfer, &c., be fixed for trial for Thursday next, the 1st day of July, 1869, at eleven o'clock a. m., & that counsel for defendant & petitioner be notified
20 thereof.

Order rule continued, as entered in the minutes of July 1st, 1869.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

It is ordered by the court that this case, fixed for this day on the petition of defendant praying for transfer, &c., be continued to Monday next, the 5th instant, at eleven o'clock a. m.

Order rule continued, as entered in the minutes of July 5th, 1869.

Second district court for the parish of Orleans.

JOSEPH FUENTES ET ALS.
vs.
MYRA C. GAINES. } No. 32979.

This case, fixed for this day on the petition to transfer, is ordered to be continued indefinitely.

Consent to continue, &c.—Filed July 12th, 1869.

Second district court for the parish of Orleans.

FUENTES & AL
vs.
MYRA C. GAINES. } No. 32979.

21 It is agreed that this case be continued until November next, at which time the motion to transfer is to be taken up and argued, July 8th, 1869. This is not to be construed as an admission of jurisdiction of the second district court.

(Signed) RACE, FOSTER & E. T. MERRICK.
" J. McCONNELL & MILES TAYLOR.

Motion to fix case, as entered in the minutes of November 8th, 1869.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA CLARK GAINES. } No. 32979.

On motion of Race, Foster, & E. T. Merrick, of counsel for defendant, it is ordered that this case, on the petition to transfer, &c., be fixed for trial for Monday next, the 15th instant, at eleven o'clock a. m., & that J. McConnell, esq., atty. for plaintiffs, be notified thereof.

Sheriff' return on foregoing motion.

22 Received November 10th, 1869, and, on the same day & month and year, served a copy of the within notice of trial on J. McConnell, esq., atty., in person.

Returned same day.

(Signed) GEO. H. TARDY,
D'y Sheriff.

Order case continued, as entered in the minutes of November 15th, 1869.

Second district court for the Parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

This case, on the petition to transfer, &c., fixed for trial for this day, is ordered, by consent of counsel, to be continued until Monday next, the 22d day of November, 1869, at eleven o'clock a. m.

Case submitted, as entered in the minutes of November 22d, 1869.

23 Second district court for the parish of Orleans.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

The petition herein, to transfer case to the United States court, came up this day for trial—present: Fellows & Mills, & E. T. Merrick, for

petitioner; J. McConnell & Miles Taylor, for defendants—when, after hearing argument of counsel, the court took the matter under advisement.

Reasons for judgment on petition, praying for removal of cause, &c.—Filed December 6th, 1869.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

This is a petition, filed by defendant, demanding that the suit brought against her by the plaintiffs be transferred to the circuit court of the United States, on the ground that she is a citizen of the State of New York, and that the plaintiffs are citizens of this State, and that,
24 under the provisions of the Constitution of the United States, and according to paragraph 12 of the judiciary act, passed by Congress in 1789, she is entitled to have this case removed to the United States circuit court.

Before granting such a demand, it is the duty of this court to examine the question in controversy, and to see, after consulting the best authorities on the matter, whether the circuit court of the United States entertain its jurisdiction over the points involved in said controversy. If it cannot, it would be a vain and useless thing, by this court, to remove the case, and occasion thereby great loss of time and money to the parties.

The object of this controversy is to annul the decree rendered by this court probating, at the instance of defendant, a certain olographic will of Daniel Clark, dated in 1813, upon grounds set forth in the
25 petition. This is the only point in the case, according to the prayer of petitioners, and the only one, indeed, that this court is called upon to examine.

It is a well-settled principle that the court who has rendered a judgment or an order is the only competent tribunal to annul it when no appeal has been taken from the same. (C. P., art. 608, 609, 610, 611.) In the case of Fouvergine vs. The City of New Orleans, (18 Howard, 471,) the U. S. Supreme Court held: "That the courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed as conclusive of the validity & contents of a will; an original bill cannot be sustained upon an allegation that the probate of a will is contrary to law. If any error was committed in allowing the probate, the remedy is in the State courts, according to their appropriate mode
26 of proceeding."

In the very case of Mrs. Gaines vs. The City of New Orleans, the United States Supreme Court expressly decided that this very will could not be attacked in the United States court. (See 6 Wallace, p. 703.)

In 2 Summers Report, p. 338, Judge Story held "that, according to the judiciary act of 1789, s. 12, such cases only are liable to removal from the State to the circuit court, as might, under the law & Constitution of the United States, have been brought before the circuit court by original process."

In 16 Peters, p. 97, Gordon vs. Longere, the question now before the

court seems to me well settled; the Supreme Court of the United States held "that the judge of the State court, to which an application is made for the removal of a cause into a court of the United States, must
27 exercise a legal discretion as to the right claimed to remove the cause."

I therefore consider that, inasmuch as Mrs. Gaines, who now seeks to remove this cause to the United States circuit court, has thought proper to make herself a party to the proceedings in this court, relative to the settlement of Clark's succession, by appearing for the probate of the will of 1813, ex parte, she cannot now avoid the jurisdiction of a court which she has selected herself, when an attempt is made to set aside and annul the ex-parte order which she has obtained to probate the will of said Daniel Clark.

It is therefore ordered, adjudged, and decreed that the petition of defendant for the removal of this cause to the United States circuit court be dismissed with costs.

Rule for rehearing, as entered in the minutes of December 9th, 1869.

28 Second district court for the parish of New Orleans.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

On motion of Race, Foster, & E. T. Merrick & Fellows & Mills, counsel for Myra Clark Gaines, it is ordered that plaintiffs show cause on Saturday, the 11th inst., at eleven o'clock a. m., why a rehearing should not be granted in the matter of the petition of said defendant to have said cause removed from this honorable court to the circuit court of the United States for the district of Louisiana, *from* among other the reasons:

1st. That the exceptions made by plaintiffs to the removal of said cause are those to be solely determined upon and adjudicated upon by said honorable the circuit court of the United States.

2d. That said exceptions are not sustained by law.

3rd. That defendant's right and petition to have said petition
29 for removal granted are guaranteed to her by law, and should be recognized by this hon. court.

Rule under advisement, as entered on the minutes of December 11th, 1869.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

The rule taken herein and praying for a new trial of the petition asking for the removal of this suit to the United States circuit court, came up this day for trial—present, Fellows & Mills & Race, Foster & E. T. Merrick, attys. for plff. in rule; John McConnell & M. Taylor, attys. for the defendants theren—when, after hearing arguments of counsel, the court took the matter under advisement.

Reasons for judgment on rule for rehearing.—Filed December 16th, 1869.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

I have searched in vain in the authorities quoted by defendant's counsel for any principles of law applicable to this cause. In the decisions o the Supreme Court of the United States, cited by counsel for defendant, a principle is established which no one can deny, i. e., that a citizen of another State of the Union, when he is brought in to a State court in a State which is not his own, has a right to demand that the case be removed to the United States court, by complying with the requirements of the 12th section of an act of Congress passed in 1789. The case which I am called upon to pronounce offers no such features, and is quite different. The defendant herein has thought proper to invoke the assistance of the tribunals of this State to provoke the will of Daniel Clark, her father, which will, she contends, has been maliciously destroyed in 1813. In this instrument rights were es-
31 tablished which she had sought in vain to establish both before the State and Federal courts. The plaintiffs in this case were not parties to the proceedings had by the defendant to prove that her father's will, made in 1813, was destroyed, and to establish what depositions it contained. The probate of this will was obtained ex parte, and, with the order admitting said will to probate, the defendant has obtained from the Supreme Court of the United States a judgment which pronounced her the legitimate heir of Daniel Clark.

Mrs. Gaines, on the strength of this judgment, brought plaintiffs before the circuit court of the United States, claiming from them the different properties which they possess, assigning, as a pretext for so doing, that that property belonged to the succession of Daniel Clark, and that it was illegally sold. The interest of plaintiff is clearly established
32 by the action in nullity which they have instituted. Can it be said that this action is independent or foreign to the proceedings had by Mrs. Gaines asking the probate of Daniel Clark's will executed in 1813? I do not believe it. She has choosen this tribunal to establish her rights to her father's succession; how can she complain now, that those who are aggrieved by her acts before this same court, select it to discuss their rights contradictorily with her? Why did she not select the circuit court of the United States to probate that will? It was evidently because that tribunal had no jurisdiction in such cases. Therefore, if the United States circuit court did not have jurisdiction to probate the will, it has not certainly the right to annul the decree of the State court, which alone has that jurisdiction. This principle is
33 clearly laid down in the cas' of Fouvergne vs. City of New Orleans, 18 Howard, 471, already quoted in the judgment which is here sought to be revised by new trial.

I must here state that, considering its importance, I have bestowed upon this case all the attention and care of which I am susceptible. I have read over with the greatest attention the decisions quoted by defendant's counsels, and I have not been able to find anything whatsoever which has tended or caused me to alter, in the least, the opinion which I have already expressed in this case in relation to the transferring of it in the United States court.

The new trial is therefore refused.

Judgment on petition for transfer of suit.

34 Second district court for the parish of Orleans.

JOS. FUENTES & ALS. vs. MYRA C. GAINES. } No. 32979.

For the reasons assigned in the written opinion of the court this day delivered & on file, it is ordered, adjudged, and decreed that the petition of the defendant for the removal of this cause to the United States circuit court be dismissed, with costs.

Judgment rendered December 6th, 1869. Judgment signed December 17th, 1869.

(Signed) LS. DUVIGNEAUD, *Judge.*

Petition & affidavit for removal of suit to the U. S. circuit court.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. vs. MYRA CLARK GAINES. } No. 32979.

To the honorable the said second district court for the parish of Orleans:

The petition of Myra Clark Gaines, a citizen of the State of
35 New York, respectfully represents:

That the above entitled and numbered suit of Joseph Fuentes & al. vs. Myra Clark Gaines, No. 32979 of the docket, is now pending in this honorable court, and in which all the plaintiffs are citizens of this State, and the defendant, your present petitioner, is a citizen of the State of New York, and in which there is a controversy between said plaintiffs and defendant, and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs;

That petitioner has reason to and does believe that, from prejudice and local influence, she will not be able to obtain justice in this honorable court; and wherefore, in addition to her previous application and petition for removal of said suit, filed on the 8th of June, 1869, your petitioner now prays for the removal of said suit from this
36 honorable court to the circuit court of the United States for the fifth circuit and district of Louisiana next to be holden.

Wherefore, the annexed affidavit and bond considered, petitioner prays that said suit, entitled and numbered Joseph Fuentes & als vs. No. 32979, Myra Clark Gaines, of the docket of this court, be removed to the circuit court of the United States for the fifth circuit and district of Louisiana next to be holden, and for all orders required in the premises.

(Signed) MYRA CLARK GAINES.

Affidavit annexed to foregoing petition.

MYRA CLARK GAINES, being duly sworn, says:

That all and singular the allegations in the foregoing petition are true; that she has reason to and does believe that, from prejudice and local

influence, she will not be able to obtain justice in this honorable
37 court in the said pending suit, entitled and numbered on the docket of this court Joseph Fuentes vs. No. 32979, Myra Clark Gaines, and that the plaintiffs in said cause are citizens of the State of Louisiana, and your affiant, defendant therein, is a citizen of the State of New York, and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs.

(Signed) MYRA CLARK GAINES.

Sworn to & subscribed to before me this 15th Dec., 1869.

(Signed) J. P. MONTAMAT, *3rd J. P.*

Bond for removal of cause, annexed to foregoing petition.

Know all men by these presents that we, Myra Clark Gaines, a citizen of the State of New York, as principal, and C. Carite, of the city of New Orleans, as surety, are held and firmly bound unto Joseph Fuen-
38 tes, Theodore Guyol, Jules Lapene, Marcelin Esnard, D. B. Macarty, P. O. Peyroux, O. Doherty, Albin Soulié, Florville Foy, G. Levasseur, M. A. Levassuer, F. M. Jacobs, P. Avril, François Mouny, N. Rilleux, Mrs. E. Fance, A. Rosseau, testamentary executor of the estate of Rodolphe Rosseau, Mrs. S. Morel and her husband O. Morel, George G. Reneke, J. Sauvage, S. Magner, George Bischoff, Albin Rochereau, S. E. Brunett, J. A. Blanc, J. L. Gubernator, François Lacroix, V. Demoruelle, W. F. Fredenburg, the city of New Orleans, M. Meilleur, David Stickney, Ferdinand Thompson, Alphonse Drez, Mrs. Sjmeon Delord, Joseph Guillot, John Despeaux, J. Hoa, J. Hernandez, Jules Lavergne, Louis Mestier, J. Bernard, R. Rousselot, A. B. Griswold, R. J. Ker, J. B. Slawson, J. C. de St. Romes, P. H. Mousseaux, C. Morel, H. Larque, B. Abadie, Pierre Minvielle, J. T. D. Lefevre, M. J. Lizardi, Raymond Carite, Casmir Carite, James L. Levau, J. Dauphine, H. Dauphine, M. de Lllano, T. Robertson, V. Baccas, P. Brunett, J. M.
39 Brunett, Wm. Creppell, P. Pesquier, R. Massand, N. Dulion, J. J. Lamoine, B. Abadie, M. Gueno, A. Baumgarten, Pierre Thery, N. Louque, J. François, widow George Perilleux, Melina Ross, and all other parties in interest, plaintiffs in the certain suit entitled and numbered Joseph Fuentes & als. vs. Myra C. Clark Gaines, No. 32979, of the docket of the second district court for the parish of Orleans, in the sum of five hundred dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated in the city of New Orleans, this 17th day of December, 1869.

Whereas the above bounden Myra Clark Gaines has this day filed a petition to have removed from the second district court for the parish of Orleans, to the next circuit court *for the parish of Orleans* for the fifth circuit, and district of Louisiana, the said certain suit in
40 said second district court for the parish of Orleans, and entitled and numbered Joseph Fuentes & als. vs. (32979) Myra Clark Gaines:

Now, the condition of the above obligation is such that, if said Myra Clark Gaines shall enter, in said circuit, on the first day of its next session, copies of said suit & process against her, as also of all pleadings, deposition', and other proceedings in said suit, and such other appropriate acts as are required to be done upon the removal of a suit into the United States court, under the provisions of the act of Congress entitled "An act to amend an act entitled 'an act for the removal of cause' in

certain cases from State courts,' approved July 27th, 1866," and which said amendatory act was approved March 2d, 1867, then this bond shall be null and void, otherwise to remain in full force and effect.

(Signed) MYRA CLARK GAINES.
C. CARITE.

Signed & delivered in presence of—
GEO. H. PENN.
P. MENYELLE.

41 *Order rendered on petition.—Filed December 17th, 1869.*

Let Jos. Fuentes & als., petitioners & plaintiffs in the above-entitled and numbered cause, show cause, on Friday next, the 24th December, 1869, at eleven o'clock a. m., why the order prayed for by defendant, Myra Clark Gaines, should not be granted.

New Orleans, December 17th, 1869.

(Signed) L'S DUVIGNEAUD, *Judge.*

Citation.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

Mr. Jos. Fuentes & al. (through their attys., J. McConnell & Miles Taylor:)

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver
42 your answer to the same, in the office of the clerk of the second district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable L's Duvigneaud, judge of the said court, the seventeenth day of December in the year of our Lord, 1869.

(Signed) M. O. TRACY, *Clerk.*

Sheriff's return on above citation.

Received December 18th, 1869, and on the same day served a copy of the within citation and accompanying petition on plaintiff herein by a personal service on Jas. McConnell, one of his attys.

Returned same day.

(Signed) J. W. T. LEECH, *D'y Sheriff.*

Bill of exception.—Filed December 17th, 1869.

Second district court for the parish of Orleans

JOS. FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

43 Be it remembered that on this 13 December, 1869, Myra Clark Gaines, a citizen of the State of New York, through her counsel, to the decree and order of this honorable court this day rendered, refusing

to grant the removal of the above-entitled and numbered cause from this court to the circuit court of the United States for the fifth circuit and district of Louisiana, as petitioned and prayed for in her petition for removal, filed herein on the June, 1869, hereby excepts; and, in order that her said exception may at all times appear of record, her counsel tender this their bill of exceptions to said decree.

(Signed) L'S DUVIGNEAUD, *Judge.*

Case under advisement as entered in the minutes of December 24th, 1869

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA CLARK GAINES. } No. 32979.

44 This case came up this day on the petition filed December 17th, 1869, and praying for removal of suit in the United States circuit court—present: Fellows & Mills, & Race, Foster & E. T. Merrick, for pet'r, Jas. McConnell & Miles Taylor, for defendants when, after hearing argument of counsel, the court took the matter under advisement.

Reasons for judgment on petition praying for removal of suit and filed December 17th, 1869.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA CLARK GAINES. } No. 32979.

I see nothing in the acts of Congress passed in 1866 & 1867, upon which the petition is predicated for the removal of this cause, which give' jurisdiction to the circuit courts of the United States in probate matters; therefore my former opinion upon this subject remain' unchanged.

45 The only difference to be found between the act of 1867 and that of 1869 is, that in the former act either plaintiff or defendant may, even during the trial of the cause, pray for its removal to the circuit court of the United States, if he believe that from prejudice and local influence he cannot obtain justice in the State court, while in the latter act that privilege was granted only to the defendant. But that act of 1867, in my opinion, can have no application in the present case, which is merely an incident of a cause in which the applicant for the removal had already obtained a judgment as plaintiff, and in which cause the circuit court of the United States could not entertain original jurisdiction.

The means provided by our code of practice, art. 556, for the revising, setting aside, or reversal of definitive judgment' are, first, by a new trial; second, by appeal; third, by action of nullity; fourth, by resci'sion.

46 As an illustration of the above principle, let us suppose here that it the plaintiffs in the cause which the removal is prayed for, instead of having resorted to an action in nullity to set aside the definitive judgment complained of by them, had resorted to an appeal to the supreme court of the State, or to a motion for a new trial of the cause,

could it be contended that in either instance the plaintiff or the defendant in the cause would have had the right to pray for a removal of the case to the circuit court of the United States, in order to have before that tribunal either the new trial granted or refused, or the appeal adjudicated upon?

Even in an ordinary case, where the circuit court of the United States could entertain original jurisdiction, it could not be done, for the obvious reason that the circuit court of the United States is not by law a
47 court where judgments rendered by State courts could be appealed to, nor motions for new trial of judgments rendered by State courts to be disposed of, and especially more so when that tribunal has no original jurisdiction in the case at bar.

It is, therefore, ordered, adjudged, and decreed that the petition of Mrs. Myra Clark Gaines for the removal of this cause to the circuit court of the United States be dismissed with costs.

Rule for rehearing on decree of 3rd January, 1869.—Filed January 4th, 1870.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

On motion of Race, Foster & E. T. Merrick, & Fellows & Mills, attys. of Myra Clark Gaines, defendant in the above entitled and num-
48 bered cause, it is ordered by the court that plaintiffs, Joseph Fuentes & als., do show cause, at eleven o'clock a. m., on the eleventh January, 1870, why a rehearing should not be granted in the matter of the petition of said Myra Clark Gaines, filed on the 17th December, 1869, to have said cause removed from this honorable court to the circuit court of the United States for the fifth circuit, and district of Louisiana, for, among other, the following reasons:

1st. That the reasons stated by this honorable court in its judgment rendered on the 3rd instant, refusing the defendant's petition for removal, if correct in law, which defendant, with deference, deny', are such as could only be determined and adjudicated upon by said honorable the United States circuit court.

2d. That the said reasons so stated by this honorable court are not sustained in law.

49 3d. That defendant's right and petition to have said petition for removal granted are guaranteed to her by law, and should be recognized by this honorable court.

Sheriff's return on above rule.

Received January 5th, 1870, and on the 7th day of January served copy of the within rule on Joseph Fuentes, through James McConnell, atty. at law, in person.

Returned same day.

(Signed) WM. BULLITT,
D'y Sheriff.

Plea of res adjudicata against city of New Orleans.—Filed January 10th, 1870.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

And now this defendant, reserving all her other exceptions, further excepting to the action of the city of New Orleans, one of the
50 petitioners in the above-entitled cause, says, that since the filing of her previous exception of res adjudicata against the action of said city of New Orleans, and on the final decree of the Supreme Court of the United States, at the December term of said Supreme Court, A. D. 1867, in the said suit in equity entitled Myra Clark against the said City of New Orleans, and No. 2695 of the docket of the United States circuit court for the then eastern district of Louisiana, as in said exception of res adjudicata is fully set forth, the said final decree of the Supreme Court has been filed and made executory, and in accordance therewith a final decree has been rendered, viz, on the 11th day of June, A. D. 1870, and entered up by said United States circuit court for the now district of Louisiana, and signed on the 15th day of June, A. D. 1870, and by which final judgment and decree, among other things, the rights of this
51 defendant, as the sole and legitimate heir & universal legatee of the said Daniel Clark to his succession, was recognized and established, as more fully shown by a certified copy of said decree and judgment of said circuit court hereto annexed as part of this exception; and whereupon this defendant pleads said decree of said Supreme Court of the United States, and the decree & final judgment of said United States circuit court for the district of Louisiana, the same having the force of the thing adjudged, in bar of the right of the said City of New Orleans to maintain the present suit.

And whereupon this defendant prays for judgment against the said City of New Orleans, one of the plaintiffs in this suit, on this her said plea of res adjudicata.

(Signed) FELLOWS & MILLS,
RACE, FOSTER, & E. T. MERRICK.

52 *Rule continued as entered in the minutes of January 11th, 1870.*

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

By consent of counsel, it is ordered that the rule taken herein January 4th, 1870, & fixed for trial for this day, be continued to to-morrow at eleven o'clock a. m.

Rule continued, as entered in the minutes of January 12th, 1870.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

It is ordered by the court that the rule taken herein January 4th, 1870,

& fixed for trial for this day, be continued to Monday next, the 17th instant, at eleven o'clock a. m.

Rule continued, as entered in the minutes of January 17th, 1870.

Second district court for the parish of Orleans.

53 JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES.

It is ordered by the court that the rule taken herein January 4th, 1870, & fixed for trial for this day, be continued indefinitely.

Motion of recusation.—Filed January 18th, 1870.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA CLARK GAINES. } No. 32979.

And now, for the sole purpose of pleading the recusation of Hon. Louis Duvigneaud, judge of this honorable court, Myra Clark Gaines, defendant in the above-entitled cause, pleads this her plea of recusation on the grounds:

1st. That honorable Louis Duvigneaud, judge of this court, is attorney of record for Henry Tabary, one of the defendants in the suit entitled and numbered Myra Clark Gaines vs. Denis Cronan & als.,
54 and as such has been consulted in said cause, now pending in the United States circuit court for the district of Louisiana in chancery, numbered 4006 of the docket of said court, and which forms a basis of the suit at bar, as shown by a certified copy of said answer here annexed as a part of this plea.

2nd. That said honorable Louis Duvigneaud is interested in the issues involved in this cause, in this that said honorable Louis Duvigneaud claims to be the owner contradictorily with claim of defendant, as heir & universal legatee of Daniel Clark, of certain properties on grand route St. John, going to Bayou St. John, being in square No. 1525 of Pilié, surveyor, being lot No. 14, contained within the survey made by Tampe on the 5th June, 1807.

Whereupon defendant prays that said plea of recusation be recognized by the judge of this honorable court.

55 (Signed) RACE, FOSTER, & MERRICK,
FELLOWS & MILLS,
Attys.

Document annexed to & referred to in foregoing motion of recusation.

Hon. sixth judicial circuit court of the United States of America.

MYRA CLARK GAINES
vs.
DENNIS CRONAN & AL. } No. 4006.

Now comes into court, through his counsels, Henry Tabary, one of the defendants in the above-entitled suit, and, for answer to plaintiff's demand, denies all and singular the allegations therein contained.

Respondent, further answering, pleads the prescription of ten, twenty, and thirty years, and prays that plaintiff's demand be hence dismissed with costs. And as in duty bound.

(Signed) L'S & J. DUVIGNEAUD,
Of Counsel.

CLERK'S OFFICE.

A true copy of the original, filed July 11th, 1868.
New Orleans, January 10th, 1870.

56 (Signed) F. B. VINOT,
D'y Clerk.

Endorsement on foregoing motion of recusation.

I was elected judge of the second district court for the parish of Orleans, in April, 1868, & I took my seat on the 15th of July same year.

(Signed) L'S DUVIGNEAUD, *Judge.*

Order of recusation, &c., as entered in the minutes of January 18th, 1870.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

Whereas the defendant in this case has this day filed an application for the recusation of the judge of this honorable court, to *seat* for the trial of this case, on the ground that he has been counsel for one of the defendants in the case of Myra Clark Gaines vs. Denis Cronan & al., now pending before the circuit court of the United States, and
57 further that he is the owner of property situated on great route St. John in this city, which property is comprised among the property belonging to the estate of the late Daniel Clark.

It is therefore ordered that the judge of this court, actuated in the premises by a motive of pure delicacy, being satisfied of the incorrectness of the grounds set forth for his recusation, do hereby recuse himself for the trial of this case, and do call to *seat* in his place & stead, the T. W. Collins, judge of the seventh district court for the parish of Orleans.

Motion to fix rule, as entered in the minutes of January 21st, 1870.

JOS. FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans, T. W. Collins, esq., judge of the seventh district court, presiding in place of his honor Judge L's Duvigneaud, who recused himself.

58 On motion of Miles Taylor, & J. McConnell, of counsel for the plaintiffs:

It is ordered by the court that the motion for rehearing herein made by defendant upon the petition for the removal of this cause to the circuit court of the United States, be fixed for trial on Monday, January 31st, 1870, at 12 o'clock m., and that the defendant be notified thereof.

Sheriff's return on foregoing motion.

Received January 22d, 1870, and on the 24th day of the same month and year, served a copy of the within motion on Messrs. Race, Foster, & E. T. Merrick, attorneys for defendant herein.
Returned same day.
(Signed) J. W. T. LEECH, *D'y Sheriff.*

Rule continued as entered in the minutes of Jan'y 31st, 1870.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS., *vs.* MRS. MYRA C. GAINES. } No. 32979.

59 Hon. T. W. Collens, judge of the seventh district court, presiding in place of his honor, judge L's Duvigneaud, who recused himself.

By consent of counsel in open court, it is ordered that the motion for rehearing herein made by defendant upon the petition for the removal of this cause to the circuit court of the United States, fixed for trial for this day, be continued until Monday next, the 7th February, 1870, at eleven o'clock a. m.

Rule continued, as entered in the minutes of Feb'y 7th, 1870.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

Hon. T. W. Collens, judge of the seventh district court for the parish of Orleans, presiding in the place of his honor judge L's Duvigneaud, who recused himself.

60 The motion for rehearing herein made by defendant upon the petition for the removal of this cause to the circuit court of the United States, came up this day for trial—present, Fellows & Mills, & Race, Foster, E. T. Merrick, for plaintiff in motion; J. McConnell, esq., for deft. therein—when, after hearing arguments of counsel, until three o'clock p. m., the hour for adjourning having arrived, the matter is continued until to-morrow, at 9½ o'clock a. m.

Rule continued, as entered in the minutes of Feb'y 8th, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

Hon. T. W. Collens, judge of the seventh district court for the parish of Orleans, presiding in place of his honor judge Ls. Duvigneaud, who recused himself.

61 The argument was this day resumed in the matter of the motion for rehearing herein made by defendant upon the petition for

the removal of this cause to the circuit court of the United States—present, Race, Foster & E. T. Merrick, & Fellows & Mills for plff. in motion; J. McConnell & Miles Taylor for defendant therein—when, after hearing further argument of counsel, the matter is continued until Saturday next, the 12th instant, at half past 9 o'clock a. m.

Rules submitted as entered in the minutes of Feb'y 12th, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES. }

Hon. T. W. Collens, judge of the seventh district court for the parish of Orleans, presiding in place of his honor Judge Ls. Duvigneaud, who recused himself.

62 The argument was this day resumed in the matter of the motion for rehearing herein made by defendant upon the petition for the removal of this cause to the circuit court of the United States.

When, after counsel heard, the court took under advisement the said motion for rehearing, and by consent of counsel the question of removal is also submitted to the court for adjudication.

Reasons for judgment on motion for rehearing, &c.—Filed March 21st, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES. }

Fuentes and others have filed a petition in this court praying, on stated grounds, that the ju'gment recognizing a certain will of Daniel Clark be revoked and annulled.

The will was probated & recognized at the instance of
63 Mistress Myra Clark Gaines, who is, by its dispositions, made universal legatee; and the present petitioners pray that she be cited.

Before responding, she has, in due form, asked for the removal of the proceeding to the circuit court of the United States, on the ground that she is a citizen of the State of New York, and that "the matter in dispute in this suit exceeds five hundred dollars." She also declares and swears "that, from prejudice and local influence, she will not be able to obtain justice in this honorable court."

I will examine these two grounds separately.

I.

A great deal has been said in the argument of this case on the questions (1) whether or not this action has been prescribed, or otherwise extinguished by lapse of time; (2,) whether or not the probate
64 of the will has not become final and beyond the power of the court to disturb it through an action of nullity; (3,) whether or not the question raised is res adjudicata against the petitioners; (4,) and whether or not another State court might not hear and determine

the matter collaterally by virtue of concurrent jurisdiction granted by the State laws; but none of the questions arise here now. The question now is simply this, (5,) whether or not the proceeding instituted by Fuentes & als. is one of those suits described or denoted by the acts of Congress providing for the removal of causes from the State courts *of* circuit court of the United States.

An elaborate review of the arguments made and precedents adduced for an affirmative or negative answer to this question would be a work of supererogation, or rather of presumption, on my part. The Supreme Court of the United States have decided it with regard to the very
65 will now enquired of. When proof of this will was originally offered on behalf of the present defendant in the circuit court of the United States for this district, the Supreme Court of the United States decided that the circuit court was without original jurisdiction to act on that proof, and sent the defendant to this court as the proper and only place for the probate of the will. (2nd How., 619.) When, after the will had been probated here, parties sued in the circuit court of the United States, adduced proofs there against the authenticity and validity of the will, the Supreme Court refused to act on these proofs collaterally on the ground, substantially expressed, that it was without jurisdiction to revise or disturb the judgment of probate rendered by this court. (6th Wallace, 703; 18 Howard, 471.) This was sending both parties, each in their turn, to this tribunal, and, therefore, cannot presume to send them back again.

66 I understand this course of the Federal judiciary to be based on the consideration that the proceedings to probate a will or to revoke a probate cannot be regarded in the sense of the acts of Congress as a controversy or a suit between parties personally. It is true the State laws may require certain persons having a presumptive interest to be called, but no judgment can be rendered against them individually or nominatively, as in a real or personal action. It is a proceeding binding on the whole world, (Greenleaf, 550,) and operating as evidence upon whatever interest may now or hereafter be affected by such evidence between citizens of this State or between citizens of other States and of all States indiscriminately. It is clear that the citizens of States whose rights of property would be injuriously affected by the revocation demanded are as really defendants here as the nominal de-
67 fendant, Mrs. Gaines. Such persons might intervene and oppose the petitioners, Fuentes & als., and even if they do not appear, they would be prima facie bound by the decree. It would be evidence against them. (C. P., 943; C. C., 1650.) Indeed, the proceeding is one concerning the forms which are to be observed to give a valid existence to a will, without which there is no will, and to clothe it with, or refuse it, the authenticity which would make it evidence in a court of the State. There is no will which can be noticed by any court till the probate court orders it to be opened, proved, executed, and recorded. This recording (of olographic wills) is made on the books of the probate court, and I understand that the Federal courts, whatever they may determine collaterally or incidentally, have always refused to interfere with or control the records and registries and fiats, of State courts with
68 regard to those records, &c. They will not take jurisdiction to decide what entries shall be made, what documents shall be allowed or refused a registration, whatever may be the effect they might concede one way or the other to the allowance, refusal, or revocation of registration. They will no more assume the functions or jurisdiction of the State court that decides to revoke or record a will than those of a

notary who draws up a nuncapative testament, preserves it in his own archives, and authenticates it with his seal. These are matters in rem affecting a thing which is itself no man's especial property. The records of this court belong to the world. They are the expression of the judicature, administration, & polity of the State, and, so far as they are such expression, they are necessarily internal and exclusively within the State control. What effect the annulment by this court of
69 its own former order to register a will would have in other States and countries, or in the Federal courts, is not a consideration which can restrict its power to administer and keep its own records. To ask for a registry or the annulment of a registry, is not to demand any property or money from a person. The petitioners do not ask that Mrs. Gaines be condemned to surrender any property to them, nor to pay them any sum, nor to do any act whatever. It is not asked that any ownership or possession be disturbed, divested, or changed. There is no amount in dispute. It is simply a prayer (whether well founded or not is not now the question) asking this court to purge its own records or registry of an act said to have been wrongfully or erroneously put there. The proceeding and decision on this prayer may be or may not be evidence hereafter in a suit or controversy between the
70 present parties. It may or may not be evidence between other parties as well. It may make or defeat the proof in some future suit or controversy. But this is not the "suit" or "controversy" itself between those parties which can be heard in a Federal court, and hence it cannot be removed.

II.

By a comparison of the act of Congress relative to the removal of causes, passed July 27th, 1866, and March 2d, 1867, with the 12th section of the judicial act, it will be seen that the object of the acts of 1866 & 1867, was to extend the right of removal so as to give it to "either party, whether plaintiff or defendant," and to enable them to exercise it at any time before the final hearing or trial of the suit, using the word suit as synonymous with controversy, and saying that, upon the removal to the court of the United States, "the suit shall proceed
71 in the same manner as if it had been brought there by original process." Formerly it was only the defendant who could ask for a removal, and this only in limine. Now, either party, even after issue, is allowed the privilege, on certain additional conditions, which *in* the defendant, Mrs. Gaines, has complied with; but the reasons which would prevail a removal under the 12th section still subsist, and are applicable also to petitions for removals under the later statutes. The same ground relating to the essential nature of the proceeding which would prevent the transfer under one law precludes it under the other. It is settled by Federal jurisprudence "that it was not intended to extend the jurisdiction of the United States courts over causes brought before them on removal beyond the limits prescribed by their original jurisdiction." (Conklin, 155; 2d Summers, 338.)

Let the new trial and the order of removal be refused.

72 *Judgment on motion for rehearing & on petition to remove, &c.*

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. } *vs.* } No. 32979.
MYRA C. GAINES.

For the reasons assigned in the written opinion of the court, this day

delivered, & on file, it is ordered that the motion for rehearing herein made by defendant upon the petition for the removal of this cause to the circuit of the United States be dismissed, & that the order for removal be refused.

Judgment rendered March 21st, 1870.

Judgment signed March 25th, 1870.

(Signed) T. WHARTON COLLENS,
Judge of the Seventh District Court, Presiding in the place of Judge Ls. Duvigneaud, who Recused Himself.

Exceptions.—Filed March 26th, 1870.

73 Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

And now Myra Clark Gaines, defendant in above entitled and numbered cause, a citizen of the State of New York, first reserving now and at all times her right to the removal of this cause from this honorable court to the United States circuit court for the fifth circuit and district of Louisiana, as herein, to wit, on the 8th June, 1869, and 17th December, 1869, by her petitioned and prayed for, and refused by this honorable court, and also now and at all times reserving her right to legal relief against the said refusals, and only now in this court further appearing under the order of this court for said defendant to further plead to said plaintiffs' action in this court, now pleads this her declinatory exception, to wit:

That this honorable court is not vested with jurisdiction of this
74 cause, for that on the 8th June, 1869, your respondent, before otherwise making appearance in this cause, petitioned for the removal of said cause to the United States circuit court for the fifth circuit and district of Louisiana, in virtue of and in strict accordance with the twelfth section of the act of Congress entitled "An act to establish the judicial courts of the United States," approved September 24th, 1789, and tendered bond, with good and solvent security and conditioned according to law, in the sufficient sum of five hundred dollars, as all appears of record in this suit.

And further, for that on the 17th December, 1869, respondent also again applied for the removal of said cause to the said United States circuit court, in virtue of the provisions of the act of Congress entitled

"An act to amend an act entitled 'An act for removal of causes in
75 certain cases from State courts,' approved July 27th, 1866," approved March 2d, 1867, and tendered bond, with good and solvent security, in the sufficient sum of five hundred dollars, and conditioned according to law, and complied with all the terms and conditions of said act, as all appears of record in this suit.

Whereby your respondent pleads and alleges that this honorable court has no jurisdiction in this cause, nor right to proceed further herein.

Wherefore respondent prays that this her exception be sustained, and she be dismissed from further pleading or answering in this honorable court.

And now, in case the above declinatory exception should be overruled by the court, and not otherwise, and again at all times reserving her rights under the same, defendant pleads this her further declinatory exception, to wit:

76 That this court is not vested with jurisdiction of this suit, in this, that this defendant is the heir at law and universal legatee of Daniel Clark, and in possession, and that the constitutional and legal jurisdiction of this court is confined exclusively to probate jurisdiction, and does not extend to a jurisdiction of this cause either as regard the parties thereto or the subject-matter of said suit.

Wherefore respondent, before being required to further plead in the premises, prays judgment on this exception, and that the same be sustained, and she be dismissed from further pleading or answering in this suit.

And now, in case the above declinatory exception should be overruled by the court, and not otherwise, and again at all times reserving her rights under the same, respondent pleads this her further ex-

77 ception, that the plaintiffs cannot have and maintain their action in its present form, because there is no warrant or authority in law, for the joinder of the said several parties is oppressive, and tends to perplex & harrass the defendant by requiring different exceptions and answers to the various plaintiffs in their action, who have set forth and shown no right in common with each other.

Wherefore respondent prays that this her exception be sustained, and plaintiffs' petition be dismissed.

And now, in case said before exception should be overruled, and not otherwise, and again and at all times reserving her rights under said exception, respondent, further excepting to plaintiffs' petition, says that the said plaintiffs have not shown in themselves any authority or legal interest in and to the succession of said Daniel Clark, deceased, either as heirs or legatees, or otherwise, and they are thus without right

78 to contest the legitimacy of this defendant as heir of the said Daniel Clark, and thus without right to contest the validity of said will of Daniel Clark of the year 1813, and this defendant's rights under the same, and so the said plaintiffs cannot have and maintain their said petition and suit in its present form.

Wherefore respondent prays that this her exception be sustained, and plaintiffs' petition be dismissed.

And now, in case the foregoing exception should be overruled, and not otherwise, and now and at all times reserving her rights under the same, respondent, further excepting to plaintiffs' petition, says that the allegations therein charging fraud, error, illegality, and insufficiency in the evidence and testimony of the witnesses upon which the said will of Daniel Clark of the 13th July, 1813, was admitted to probate, are

79 vague, loose, and indefinite, and are not sufficiently clear and distinct to enable defendant to know as against what evidence or what particular testimony of any of said witnesses she is required to defend her rights against said alleged fraud, error, illegality, and insufficiency.

Wherefore respondent prays that this her exception be maintained, and that the petition of plaintiff' be dismissed, unless said plaintiffs amend the same by alleging what particular fraud, what particular error, what particular illegality and insufficiency in each & every said evidence and testimony of said witnesses the said plaintiffs rely on to maintain their action, and, in default thereof, that said petition be dismissed.

And now, in case the foregoing exception should be overruled, and not otherwise, and now and at all times reserving her rights under

80 the same, further excepting to the action of the city of New Orleans, one of said plaintiffs, says that the said city of New

Orleans cannot have or maintain the present action against this defendant, because in the suit in equity instituted by the respondent, Myra Clark Gaines, against the said city of New Orleans & others, in the circuit court of the United States for the fifth circuit and the then eastern district of Louisiana, in cause No. 2695 of said circuit court, wherein, among other things, the right of this defendant as the sole and legitimate heir and universal legatee of the said Daniel Clark, deceased, to his succession was put at issue and brought directly in controversy, and the decision of the said circuit court of the United States being adverse to this respondent, complainant in said action, an appeal was taken and prosecuted before the Supreme Court of the United
81 States, at Washington, when, at the December term of the said Supreme Court, A. D. 1867, the said decree of the circuit court was, by a final and irrevocable decree of said Supreme Court of the United States, reversed and the right of this defendant as legitimate heir and universal legatee of said Daniel Clark, deceased, was recognized and established; and this defendant pleads said decree of said Supreme Court of the United States, the same having the force of the thing adjudged in bar of the right of the said city of New Orleans to maintain the present suit.

Wherefore this defendant prays for judgment on this her exception of res judicata that the same be sustained, and respondent have judgment against said city of New Orleans, one of the plaintiffs in this suit.

(Signed) FELLOWS & MILLS,
RACE, FOSTER & E. T. MERRICK,
Of Counsel.

82 *Motion to fix exception.—Filed March 28th*, 1872.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Hon. T. Wharton Collins, judge presiding, in the place of Hon. L's Duvigneaud, recused.

On motion of Miles Taylor & J. McConnell, of counsel for the plaintiffs in the above-entitled suit:

It is ordered that the exceptions herein filed by the defendant be fixed for trial on Saturday, the 2nd day of April, 1870, at twelve o'clock m., and that the defendant have due notice hereof.

Notice of trial.

State of Louisiana, second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

To Mrs. Myra C. Gaines:

83 Please take notice that the exception taken in the above-entitled case are fixed for trial on the 2d day of April, 1870.

(Signed) L. ARNAULD,
D'y Clerk.

Sheriff's return on above citation.

Received March 29th, 1870, and on the 31st day of the same month & year served a copy of the within notice on defendant herein by a personal service on J. Q. A. Fellows, esq., her atty.

(Signed) J. W. T. LEECH,
D'y Sheriff.

Exceptions continued, as entered in the minutes of April 2d, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. vs. MYRA C. GAINES. } No. 32979.

By consent of counsel, it is ordered that the exceptions herein,
84 fixed for trial for this day, be continued to Saturday next, the 9th instant, at eleven o'clock a. m.

Exceptions continued, as entered in the minutes of April 9th, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. vs. MYRA C. GAINES. } No. 32979.

Honorable T. W. Collens, judge of the seventh district court for the parish of Orleans, presiding, in place of Judge L's Duvigneaud, recused.

The exceptions herein filed and fixed for trial for this day, being called, appeared Fellows & Mills, & Race, Foster & E. T. Merrick, for pl'ff in exceptions; M. Taylor & J. McConnell, for defendants therein, when, after hearing part of the arguments of counsel, the matter is continued until Monday, 18th April, 1870, at 9 o'clock a. m.

85 *Agreement.—Filed February 9th, 1871.*

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. vs. MYRA C. GAINES. } No. 32979.

In the suit of Joseph Fuentes & al. vs. Myra Clark Gaines, No. 32979, in the second district court for the parish of Orleans, and in the suits of Myra Clark Gaines vs. sundry defendants in the circuit court of the U. S., dist. of La., being Nos. 6085, 4006, 2734, 3663, 4031, 4051, 2695, 2619, in order to save expense & unnecessary labor, and facilitate a prompt & fair trial of the issues made & to be made, it is now hereby stipulated & agreed by and between the said parties herein represented by their counsel of record—

I. That the records of the Gaines cases, as printed & used before the Supreme Court of the United States, will be considered and re-
86 ceived as prima facie correct copies of the originals, (subject, of course, to correction in cases of doubt, by reference to the originals,) in lieu of the originals of which they purport to be copies, provided that nothing herein contained shall be construed as an admission of the

admissibility, relevancy, or competency as evidence of any matters of pleading or evidence contained in said records.

II. All parties defendant in the above numbered suits in the U. S. circuit court represented by Messrs. M. Taylor & J. McConnell, as counsel, who are not already named as plaintiffs in the suit of Jos. Fuentes & al. vs. Myra Clark Gaines, No. 32979, in the second district court, are to be considered & treated as parties plaintiff in said suit No. as of this date, subject to all the pleadings, exceptions, & defences made and to be made by & against said original plaintiffs, and are to be bene-
87 fitted or affected by the final decree precisely as the said original plaintiffs; the same decree or orders & final decree on appeal to be entered for or against them as may be rendered for or against said original plaintiffs in said suit No. 32979. It is understood that the parties who are to be considered as parties plaintiff in No. 32979, 2nd district court, as of this date, are those only whose names are contained in the list left with E. T. Merrick, attested by the undersigned, James McConnell, and that such new parties are to be considered subject to any plea of prescription or other defence which may have arisen or been perfected by their delay to make themselves parties to said suit up to this date, which as to them this agreement is to be considered as a citation, and the judgment in No. 32979, which they agree, shall be binding upon themselves and said Mrs. Gaines, is to be subject to said
88 additional defence arising from said delay, if it be a defence.

It is further agreed, if any of said parties have compromised with Mrs. Gaines, or there has been any special agreement between them and herself, they are to be excepted from this agreement.

III. In filing demurrers, pleas, & answers, or other pleadings when there are several defendants, the order of court requiring the same to be sworn to shall be deemed to have been complied with if the same be sworn to by any two of the said defendants.

IV. That no further proceedings will be taken in any of said causes by either party until the 15th November, 1870.

June 29th, 1870.

(Signed) J. McCONNELL, *for Various Defts.*
RACE, FOSTER & E. T. MERRICK.

89 *Note of evidence on exception.—Filed April 8th*, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. } No. 32979.
vs.
MYRA C. GAINES. }

Note of evidence taken in open court on the trial of the exceptions filed in the above-entitled matter.

Counsel for plaintiff in exceptions offered in evidence—

Statement made by Mrs. Myra C. Gaines, marked A, with leave to other party to propound interrogatories.

The above piece of evidence was not produced & filed.

Also, bill in chancery in case of Mrs. Myra C. Gaines vs. The City of New Orleans & als., No. 2695 of the docket of the circuit court of the United States, (to be furnished.)

Also, the answer & the replication contained in printed record
90 now filed & marked "B," with leave to withdraw the said

printed record & leave copies of documents offered. (Record B withdrawn.)

Also, mandate of Supreme Court on the appeal in same case, filed & marked "C," (withdrawn.)

Order, exception continued, as entered in the minutes of April 18th, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Hon. T. W. Collens, judge of the seventh district court, presiding, in place of Judge L's Devigneaud, recused.

The exceptions herein came up this day for further trial—E. T. Merrick, for plffs. in exception; J. McConnell, for deft. therein—when, after hearing further argument of counsel, the hour for adjourning having arrived, the matter is continued until to-morrow at eleven o'clock a. m.

91 *Note of evidence on exception.—Filed April 19th, 1870.*

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL. *vs* MYRA C. GAINES. } No. 32979.

Note of evidence taken in open court on the further trial of the exceptions filed in above-entitled case.

Counsel for plaintiff in exception offered in evidence—

Opinion of Supreme Court in case of Gaines vs. New Orleans, to be copied out from page 697 to page 718 of 6th Wallace, U. S. Supreme Court Reports.

Order, exception continued, as entered in the minutes of April 19th, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Hon. T. W. Collens, presiding in place of Hon. L's Duvigneaud, recused.

92 The argument was this day resumed in the matter of the exceptions herein filed, Judge T. W. Collens, presiding, in place of Hon. Ls. Duvigneaud, recused, when, after hearing counsel, & the hour for adjourning having arrived, the matter is continued until to-morrow at ten o'clock a. m., for further arguments.

Order, exceptions continued, as entered in the minutes of April 20, '71.

Second district court for the parish of Orleans. H. T. W. Collens, presiding.

JOSEPH FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

The exceptions herein came up as per continuance from yesterday, when, after hearing counsel, & the hour for adjourning having arrived, the matter is ordered to be continued to Saturday, May 14th, 1870, at 10 o'clock a. m.

93 *Petition of intervention of Rudolph Huberwald & others.—Filed April 28th, 1870.*

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

To the honorable the judge of the second district court for the parish of Orleans:

The petition of intervention of Rudolph Huberwald, Bernard Saloy, Mrs. Matthews, in her own right and as tutrix of her five minor children; John Henry Smith, Palmyra Gravier, L. D. Kernion, John McGinnis, Theodore Morano, Wm. H. Johnson, and Mrs. Mary Martin, administratrix of the estate of Jos. Pwader, & Mr. & Mrs. John Rumele, all residents of this city, respectfully showeth:

That Mrs. Myra Clark Gaines, a citizen of the State of New York, but at present residing in this city, made application to this honorable court, on the 18th of January, 1855, for the probate of an
94 alleged last will of Daniel Clark, dated July 13th, 1813, and upon hearing did obtain, before the supreme court of this State, an order by which said pretended last will of said late Daniel Clark, as set forth in her petition then filed, was recognized as the last will of said late Daniel Clark, and was ordered to be recorded and executed as such, which facts, with other necessary details, will appear from the record of the succession of the said late Daniel Clark, No. of the docket of this court.

Now, petitioners aver that the said order, or decree of probate, was obtained ex parte, and by its terms authorized any party or person, at any time, who might have interest and desire so to do, to contest the said will and probate thereof, and show that no such will was executed, either in a direct action or as a means of defence by way of an-
95 swer or exception, whenever the said will should *not* be set up as a muniment of title.

That the said Mrs. Myra Clark Gaines, having thus obtained said order of probate of the said pretended will, did, on or about the 15th day of February, 1870, institute & bring against your petitioners, severally, suit No. 6085, on the docket of the circuit court of the United States, fifth circuit & district of Louisiana, in which the said Mrs. Myra Clark Gaines set up the said pretended will of 1813, so probated, as a muniment of title, and under the same, as the instituted heir of said late Daniel Clark, claims & now still demands from your petitioners sundry tracts of lands and properties of great value, situated within this parish

and, that the value of the interest of each of your petitioners in said property thus claimed exceeds the sum of five hundred dollars.

96 That your petitioners are informed that they are unable to contest the validity of the said pretended will of 1813 in the said circuit court, on account of the peculiar jurisdiction thereof, so long as the said decree of probate remains unreversed by this honorable court, and that this honorable court is alone and exclusively competent to question or entertain a suit for the reversal and avoidance of the same.

Now your petitioners represent that the said probate of the said pretended will of July 13, 1813, was a gross fraud upon the rights of these petitioners; that the said pretended will never existed; that the evidence and testimony of the witnesses upon which the same was admitted to probate was false or erroneous, illegal, and insufficient; that if any will was made by said late Daniel Clark, at any time other

97 than the one admitted to probate and ordered to be executed by a decree of this court, dated on the 17th day of Augnst, 1813, which is expressly denied, it was destroyed or suppressed by the said Daniel Clark himself; that the said Daniel Clark left no will whatsoever posterior to that dated May 20th, 1811, which was probated, as above stated, in this court on the 17th August, 1813, by which Mrs. Myra Clark, who was his mother and his sole and legal heir, was instituted his universal legatee, and which probate and will remained in force for about forty-four years as the basis of title of the property of the succession.

And your petitioners further represent that the said Daniel Clark was never married, and had no legitimate child; that he did not recognize the said Myra Clark Gaines as his legitimate and only child, as

98 is alleged to have been set forth in the said pretended will of 1813, but, on the contrary, that the said Daniel Clark actually made ample provision for her, as his illegitimate child, by secret and confidential trusts, whereby he left property for her in the custody of her friends, which trusts have been duly executed, she having received the property thus left for her; that the said Daniel Clark did not make and could not have made a will in favor of the said Myra Clark Gaines, because of her status, fully known to the said Daniel Clark; she being the issue of an adulterous connexion, was without the legal capacity of inheriting and receiving by last will from the said Daniel Clark.

Wherefore petitioners pray that they have leave to fill this their petition of intervention, & for personal citation, and that, after

99 due proceedings had, there be judgment in favor of your petitioners and against said defendant, Mrs. Myra Clark Gaines, revoking the said pretended will of July 13th, 1813, and reversing the said decree of probate thereof as absolutely null and void and of no effect in law. And your petitioners pray for all general and equitable relief, &c.

(Signed) DERRHAMMER & KENNARD,
Attys. for Petitioners.

Citation.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES, (RUDOLPH HUBERwald et als., intervenors.) } No. 32979.

Mrs. Myra Clark Gaines, of New Orleans:

You are hereby summoned to comply with the demand contained in

the petition of intervention, of which a copy accompanies this
100 citation, or deliver your answer to the same in the office of the clerk of the second district court for the parish of Orleans in ten days after the service hereof.

Witness the honorable Ls. Duvigneaud, judge of the said court, this 28th day of April, in the year of our Lord 1870.

(Signed) M. O. TRACY, *Clerk.*

Sheriff's return on above citation.

Received April 28th, 1870, and on the same day, month, & year served a copy of the within citation and accompanying petition of intervention on Mrs. Myra Clark Gaines in person.

Returned same day.

(Signed) F. PFESTER,
D'y Sheriff.

Petition of intervention of John & James C. Davidson.—Filed May 7th, 1870.

Second district court for the parish of Orleans.

101 JOSEPH FUENTES & ALS.
vs.
MRS. MYRA C. GAINES. } No. 32979.

To the honorable the judge of the second district court for the parish of Orleans:

The petition of intervention of J. & J. C. Davidson, late a commercial firm doing business in this city, and composed of John Davidson, of this city, James C. Davidson, of the city of New York, respectfully showeth:

That Mrs. Myra Clark Gaines, a citizen of the State of New York, but at present residing in this city, made application to this honorable court on the 18th January, 1855, for the probate of an alleged last will of Daniel Clark, dated July 13th, 1813, and upon hearing did obtain, before the supreme court of this State, an order by which said pretended last
102 will, as set forth in her petition then filed, was recognized as the last will of said Danl. Clark, and was ordered to be recorded and executed as such; which facts, with other necessary details, will appear from the record of the succession of said late Daniel Clarke, No. on the docket of this court.

Now, petitioners aver that the said order, or decree of probate, was obtained ex parte, and by its terms authorized any person or party, at any time, who might have any interest or desire to do so, to contest the said will and probate thereof, and show that no such will was executed, either in a direct action or as a means of defence, by way of answer or exception, whenever the said will should be set up as a muniment of title.

That the said Mrs. Myra C. Gaines, having thus obtained said order of probate of the said pretended will, did, on or about the 15th day of February, 1870, institute and bring against your petitioners suit
103 No. 6085 on the docket of the circuit court of the United States, fifth circuit, & district of Louisiana, in which the said Mrs. Myra Clark Gaines set up the pretended will of 1813, so probated, as a muniment of title, and under the same, as the instituted heir of said late Daniel Clark, claimed, and now still demands, from your petitioners

sundry tracts of land & properties of great value situated within this parish, and that the value of the interest of each of your petitioners in said property thus claimed exceeds the sum of ($500.00) five hundred dollars.

That your petitioners are informed that they are unable to contest the validity of the said pretended will of 1813 in the said circuit court, on account of the peculiar jurisdiction thereof, so long as the said decree of probate remains unreversed by this honorable court, and that
104 this hon. court is alone, and exclusively, competent to question or entertain a suit for the reversal & avoidance of the same.

Now, your petitioners represent that the said probate of the said pretended will of July 13th, 1813, was a gross fraud upon the rights of these petitioners; that the said pretended will never existed; that the evidence & testimony of the witnesses upon which the same was admitted to probate is false or erroneous, illegal, and insufficient; that if any will was made by said late Daniel Clark at any time, other than the one admitted to probate and ordered to be executed by decree of this court, dated the 17th day of August, 1813, which is expressly denied, it was destroyed or suppressed by the said late Daniel Clark himself; that the said late Daniel Clark left no will whatever posterior to that dated May 20th, 1811, which was probated as above stated, in
105 this court, on the 17th August, 1813, by which Mrs. Myra Clarke, who was his mother and sole legal heir, was instituted his universal legatee, and which probate & will continued in force for about forty years as the basis of title to the property of his succession.

And your petitioners further represent that the said Daniel Clark was never married, and had no legitimate child; that he did not recognize the said Mrs. Myra Clark Gaines as his legitimate and only child, as is alleged to have been set forth in the said pretended will of 1813; but, on the contrary, he, the said Danl. Clark, actually made ample provision for her as his illegitimate child, by secret & confidential trusts, whereby he left property for her in the custody of her friends, which trusts have been duly executed, she having received the property thus left for her.

106 That the said Daniel Clark did not make, & could not have made, a will in favor of the said Myra Clark Gaines, because of her status, fully known to said Daniel Clarke; she, being the issue of an adulterous connection, was without the legal capacity of inheriting & receiving by last will from the said Daniel Clark.

Wherefore petitioners pray that they have leave to file this their petition of intervention, and for personal citation, and that, after due proceedings had, there be judgment in favor of your petitioners and against said defendant, Mrs. Myra Clark Gaines, revoking the said pretended will of July 13th, 1813, and reversing the said decree of probate thereof as absolutely null and void and of no effect in law, and for costs and for all general and equitable relief, &c. And petitioners will ever pray, &c.

(Signed) J. D. HILL, *Atty.*

REC. 330—3

107 *Citation.*

State of Louisiana, second district court for the parish of Orleans.

JOS. FUENTES & AL.
vs.
MRS. MYRA C. GAINES, ON INTERVENTION OF Jno. & J. C. Davidson. } No. 32979.

Mrs. Myra Clarke Gaines, of New Orleans:

You are hereby summoned to comply with the demand contained in the petition of intervention, &c., &c., of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable Ls. Duvigneaud, judge of said court, the eleventh day of May, in the year of our Lord 1870.

(Signed) M. O. TRACY, *Clerk.*

108 *Sheriff's return on foregoing citation.*

Received May 12th, 1870, and on the 13th day of the same month and year served copy of the within citation and accompanying petition of intervention, &c., on Mrs. Myra Clark Gaines, defendant herein, by leaving the same at her domicil', No. 21 Rampart street, first district, in the hands of Mrs. Christinas, her daughter, a white person, apparently above 14 years of age, living and residing in the said domicil', whose name and other facts connected with this service I learned by interrogating her, the said Mrs. Gaines being absent from home at the time of said service.

(Signed) P. LACOSTE, *D'y Sheriff.*

Petition for removal of intervention of Rudolph Huberwald & als.—Filed May 14th, 1870.

Second district court for the parish of Orleans.

109 JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

To the honorable the said second district court for the parish of Orleans:

And now Myra Clark Gaines, a citizen of the State of New York, by this her petition for removal of this cause, so far as regards the intervention herein of Rudolph Huberwald and others, filed on the 28th April, 1870, and before otherwise pleading in said intervention, respectfully represents:

That she, the said Myra Clark Gaines, is a citizen of the State of New York, and that Rudolph Huberwald and others, plaintiffs in intervention, are all citizens of the State of Louisiana, and that the matter in dispute in said intervention exceeds the sum of five hundred dollars.

That the said Myra Clark Gaines has reason to, and does,
110 believe that, from prejudice and local influence, she will not be able to obtain justice in this honorable court.

That in the premises she desires, as she is informed is her right, to have said cause in intervention remove' for trial to the next term of the

circuit court of the United States to be held in the fifth circuit & district of Louisiana, and she desires said removal.

Wherefore she, the said Myra Clark Gaines, the annexed affidavit considered, and hereby tendering bond as may be fixed and ordered by this honorable court, in amount and conditioned with good security, according to law, prays that the said cause in intervention be removed from this honorable court to the said United States circuit court for the fifth circuit and district of Lousiana, at its next session, for all orders & general relief in the premises.

(Signed) FELLOWS & MILLS.

111 *Affidavit annexed to foregoing petition.*

Myra Clark Gaines, being duly sworn, says that all and singular the allegations in the foregoing petition are true.

(Signed) MYRA CLARK GAINES.

Sworn to & subscribed before me this 11th day of May, A. D. 1870.

(Signed) A. SHELLY,
2d Justice of the Peace.

Order exceptions submitted, as entered in the minutes of the 14th May, 1870.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Hon. T. W. Collens, judge of the seventh district court, presiding, in place of judge L. S. Duvigneaud recused.

The exceptions herein filed came up this day, when, after further evidence heard, the court took the matter under advisement.

112 *Judgment on petition for removal of intervention of Rudoph Huberwald & als.*

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

In this case, on filing of the petition of the defendant, Mrs. Myra Clark Gaines, for the removal of the cause presented by the intervenor in the circuit court of the United States, J. M. Dirrhammer objected and excepted to the granting of said order of removal on the grounds heretofore filed by the original plaintiffs.

And wherefore the court, considering its judgment heretofore rendered, and reasons therefor, orders that the said removal be refused.

Judgment rendered May 14th, 1870.

Judgment signed May 19th, 1870.

(Signed) T. WHARTON COLLENS,
Judge of Seventh District Court, Acting in Place of Judge L. S. Duvigneaud, Recused.

113 *Petition for the removal of intervention of J. & J. C. Davidson, &c.—Filed May 21st, 1870.*

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. vs. MRS. MYRA C. GAINES. } No. 32979.

And now into court by the undersigned, her counsel, comes Myra Clark Gaines, and to the petition of intervention of J. & J. C. Davidson, herein filed, and upon otherwise appearing, prays that the said intervention be removed from this hon. court to the United States circuit court for the fifth circuit and district of Louisiana, for this, that she is a citizen of the State of New York, and the said intervenor, John Davidson, is a citizen of the State of Louisiana, and because she has reason to, and does, believe that, from prejudice and local influence, she will not be able to obtain justice in this honorable court in the matter of said intervention.

114 And respondent in said intervention alleges that the matter in dispute herein exceeds the sum of five hundred dollars, exclusive of costs.

And petitioner tenders herewith such bond as, in amount and with solvent security, may be determined by the court, to be conditioned according to law, and as require' for the said transfer and removal of said cause in intervention from this court to, and on the first day of, the session of the circuit court for the district of Louisiana.

Wherefore said Myra Clark Gaines, respondent in reconvention prays that said cause in reconvention be removed from this court to the next session of the said circuit court for the district of Louisiana, on respondent furnishing such bond as, in amount and to be conditioned according to law, may in the premises be required and fixed by this court for all orders required in the premises.

115 (Signed) FELLOWS & MILLS.

Affidavit.

Myra Clark Gaines, first being duly sworn, deposes & says that all singular the allegations in the foregoing petition for removal of said cause are true.

(Signed) MYRA CLARK GAINES.

Sworn to and subscribed before me this 23rd day of May, A. D. 1870.

(Signed) A. SHELLY,
Second Justice Peace.

Judgment on petition for removal of intervention of J. & J. C. Davidson.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. vs. MYRA CLARK GAINES. } No. 32979.

In this case, on filing of the petition of the defendant, Mrs. Myra Clark Gaines, for the removal of the cause presented by the intervenor in the circuit court of the United States, J. D. Hill, counsel
116 for intervenor, objected and excepted to the granting of said order of removal on the grounds heretofore filed by the original plaintiffs.

And wherefore the court, considering the judgment heretofore rendered & reasons therefor, orders that said removal be refused.
Judgment rendered May 21st, 1870.
Judgment signed May 26th, 1870.

(Signed) T. WHARTON COLLENS,
Judge of the 7th District Court, Presiding in Place of Judge Duvigneaud, Recused.

Exception (declinatory) to intervention of Rudolph Huberwald & als.—Filed May 24th, 1870.

Second distrcit court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

And for the sole purpose of excepting to the jurisdiction of this court in the premises, comes Myra Clark Gaines, herein made defendant
118 in the petition of intervention filed by the interventors, Rudolph Huberwald & als., and reserving now and at all times her rights under her petition for the removal of said cause from this court to the United States circuit court for the fifth circuit and district of Louisiana, pleads this her declinatory exception to the jurisdiction of this honorable court, in this: that heretofore, to wit, on the 14th May, 1870, said respondent, Myra Clark Gaines, filed her petition sustained by her affidavit and tender of sufficient and solvent bond, for the removal of this petition of intervention of said Rudolph Huberwald & als. from this court to the United States circuit court, fifth circuit, and district of Louisiana, which petition has been refused by this court, and which petition claims to make, and does make, part of this exception for greater certainty.

118 *Agreement to submit exceptions.—Filed Jan'y 9th*, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

The undersigned, attys. of parties plaintiffs & defendant in the above entitled & numbered case, submit the exceptions filed herein on the arguments already orally made and the accompanying arguments in writing.

(Signed) FELLOWS & MILLS,
RACE, FOSTER & E. T. MERRICK,
Attys. for Deft.
J. McCONNELL, *For Plaintiffs.*

Opinion & judgment on exceptions.—Filed January 23rd, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

The defendant has filed a number of exceptions to the petition
119 and suit herein. I will take them up in the order they have been presented.

I.

I have already decided that the case cannot be removed to the circuit court of the United States, that court having itself decided it was without jurisdiction over the main subject-matter, viz, the probate of a will and the re'cission and nullity of that probate. In the case cited from 9th Wallace, 390, the Supreme Court first decide they had jurisdiction of the subject-matter between the parties under the 11th and 12th sections of the judiciary act of 1789, and then proceed to decide a new question of procedure under the same act. The decision, therefore, does not controvert that of Judge Woods. It does not apply, either in principle or in fact, to the question in this case.

II.

120 For reasons already given, I decided that this was a direct action to demand the nullity of the judgment of this court probating a will and ordering its registry and execution. Independently of this main cause of action, this court would not have jurisdiction between the parties as, for instance, apart from the question of the validity of the will, whether or not Mrs. Gaines is the legitimate child of Daniel Clark, that legitimacy being at issue in the case pending before the circuit court, and that court (so far from refusing as with regard to the probate and mention of the will) having taken cognizance of it. This question of legitimacy can only be enquired of in this case collaterally and subsidiarily, as corroborative of other facts, or so far as it bears upon the question of the nullity of the judgment, or the
121 validity of the will itself; but, independently of this, this court cannot decide the question of legitimacy between the parties. It is, I repeat, as a question apart from the will, pending before the circuit court, which has exclusive jurisdiction of it between the parties. But it is agreed that, admitting the State courts have jurisdiction, that jurisdiction belongs exclusively to the tribunals of ordinary jurisdiction, and not to the probate court. Considering the nature of this suit, the exception is not tenable. If this were an action of revendication, and the question of the genuineness of the will were collateral or incidental, the objection would be tenable, since the ordinary tribunals have exclusive jurisdiction of questions of revendication, and in exercising that jurisdiction must pass upon all collateral matter. So, in cases where
122 the probate court has exclusive jurisdiction of the direct and principal cause of action, they may pass collaterally upon a question of title. But it seems to me impossible to hold that ordinary courts can entertain direct and principal suits for the nullity and revocation of an order or judgment of this court. If they could, then one of them might order the judgment to be annulled and the other that it be maintained, and place this court under the effect of two contradictory judgments having equal title to obedience. Certainly there is no law or decision giving the ordinary tribunals jurisdiction of a case like this. Either the suit cannot be brought at all or it must be brought here. The subject-matter cannot be enquired of by the United States courts. It is not incidental or collateral to any suit in revendication before a State court between these parties, and cannot become so, since the
123 defendant refuses the jurisdiction of those ordinary State courts in matters of revendication. Hence, if the direct action of nullity of judgment cannot be brought in this court, (as expressly and without exception required by the code of practice, arts. 604, 608, et seq.,)

the plaintiffs, though having a right expressly reserved by law to contest the genuineness of the will, would be without a remedy. It may be that an unforeseen anomaly has arisen in consequence of the incompetency of the circuit court of the United States to pass upon the issue between the parties on this matter; but if the case is so anomalous, unforeseen, and unprovided for, then, or never, would the 21st article of the civil code find its application. But I believe that there are several precedents in our State jurisprudence to the effect that the court of probates may take cognizance of direct suits brought to annul
124 its own judgments, and in facts has exclusive jurisdiction of such actions. McCombs vs. Dunbar, 1st Lou., 21; Clark vs. Christine, 12th Lou., 396, would also apply, since the plaintiffs, by their allegations, shew that they are directly affected by the judgment they seek to annul.

Graham vs. Gibson, 14 Lou., 150.
Harty vs. Harty, 8 N. S., 520.
Dars vs. Laumont, 5th Rob., 384.
Lewis vs. Executors, 5th Lou., 393.
Robert vs. Allier, 17th Lou'a, 14, et seq.
Suc. of Duplessis, 10th Rob., 195-6.
Rhodes vs. Union Bank, 7 Rob., 63.

Besides attacking the judgment of probate, on the ground that the alleged will of 1813 never had any existence, the plaintiffs go further, and attack the validity of that will itself, even on the hypothesis that it was really made and proved, on the ground the Clark was never married; that defendant is an adulterous bastard, and incapable
125 of receiving a legacy from Clarke. Plaintiffs' right of raising these questions will be examined under a subsequent head.

III.

There is no misjoinder of plaintiffs. They all allege the same cause of action, derived from the same source—the will made by Daniel Clark in 1811; and ask for only one and the same judgment against only one party. A single suit and trial, so far from working any injury or inconvenience, will save useless multiplicity of litigation. The case would be different if it appeared from the face of the petition or were shewn on the trial of the exceptions that the suit result in several judgments, (a different one with regard to each party plaintiff for a different thing or sum,) though rendered at the same time.

If any one of the plaintiffs have a sufficient interest and right
126 to bring the action, the joinder of the others to that plaintiff is immaterial to the defendant, since a judgment annulling the order of probate and execution of the will might be rendered at the suit of one as well as the suit of many.

IV.

I think plaintiffs shew in their petition and in the records filed by defendant a sufficient interest to maintain this action, properly understood to be a suit to annul the probate and order for the execution of the will of 1813. They shew an interest under the will of 1811, and that it is the basis of their title to property derived from the heirs and representatives of Clark instituted by that will. The probate and execution of the will of 1813 would defeat their title.

Two wills of Daniel Clark have been admitted to probate in this

127 court. The plaintiffs claim a title and rights under the first and the defendant under the second. Clearly the parties have rival interests derived from the same source, the succession of Daniel Clark. The question to whom was that succession bequeathed is vital to them respectively. The plaintiffs are, therefore, directly affected by the probate of the will of 1813. In 12th Lou., the Supreme Court decided that the party directly affected by a judgment of the probate court could bring an action of nullity against a judgment of partition. Why not also a judgment probating a will, when that judgment directly affects the title a party holds? I see no good reason for deciding that this cannot be done. There is no law to the contrary. It is argued that articles 1491, 1986, and 2563 preclude such an action from being
128 brought by any other than the forced heirs or their heirs or assigns; that neither the donees, legatees, nor creditors of the deceased can bring it. But the prohibition of article 1491 relates to the reduction of a donation made in a valid will. It cannot apply to a will entirely null or without effect for want of form, proof, or some other fatal infirmity. When such a will is presented, any one directly affected may impeach it for the legal cause that destroys its validity. True, under art's 1986 or 2563, creditors cannot force a debtor to accept a donation intervivos, or exercise a right of redemption; but these restrictions or exceptions have here no application whatever. The plaintiffs do not present themselves either as creditors of a donee or of a vendor; nor do they seek in any capacity to compel an heir or legatee to accept a succession. They present themselves as the assigns of one who was a forced heir in case Clark died without a legitimate
129 descendant. (C. C. 1481.) Holding a title of the succession property from such an author, they have the same right as that author to protect their title, even against an attempted reduction, claimed even under a valid will, by shewing that Clark left no children and that their author is a forced heir under article 1481.

Besides and apart from this, it is conceded and indisputable that if a will is adduced as a muniment of title in an action of revendication, the adverse party may shew collaterally and incidentally that the will has no validity. So it is certain that before our ordinary tribunals the plaintiffs, if sued for property claimed from them by virtue of this will, might contest it even collaterally. Why not, then, directly? No reason is suggested why they cannot. In all the cases cited, in which parties were precluded from contesting a will, those parties were
130 either intermeddlers, or the case stood so that it made no difference to the contestant's right of property whether the will was valid or not. Suppose, for instance, that the plaintiffs were not in any manner the assignees of any heir, representative, or legatee of the succession of Clark, then it would be immaterial to them whether that succession had been transmitted by inheritance or legacy, or otherwise, to one person or the other. If that succession transmitted a title better than theirs, it would prevail. They would stand as entire strangers to the succession, and might perhaps be told that, since the person having an interest in the succession as heir or legatee chose to remain silent, strangers could not, even indirectly, assert his or her rights. But, as stated above, the plaintiffs are not strangers to the succession, or to the transmission of its property. They do not stand up to
131 assert the rights of an heir or legatee who has refused or neglected to accept, but of one who has actually accepted, and whose rights have been assigned to them.

V.

It is contended that the allegations of error, fraud, &c., in plaintiff's petition are loose, vague, and indefinite. In several clauses they are undoubtedly chargeable with this defect. They are, it is true, taken from a decision of the Supreme Court, but that court was not giving a form for a sufficient petition. They were only indicating in a general way what must be finally demonstrated in order to obtain a decree declaring the invalidity of the alleged will of 1813. They were not stating what ought to be the allegations of a petition seeking to apply the law as stated by the court. Greater precision and more particularity
132 is necessary to enable the party defendant to know what is the kind or range of the evidence that will be adduced, or what is the characteristics and denomination of the facts the plaintiff proposes to prove and rely on.

The objectionable clauses in plaintiffs' petition are these: that the will of 1813 was a gross fraud; that it never existed; that the testimony of the witnesses was false or erroneous; that Daniel Clark left no will whatever posterior to that dated May 20th, 1813. These are mere denials which would do very well for a defendant, but for a plaintiff on whom the onus of proving a negative devolves. The plaintiff either can or cannot adduce facts, affirmative facts, from which the negatives or negative conclusions may be deduced, or they have no evidence whatever to present. If they can prove nothing con-
133 trary to the probate, or to the testimony of the witnesses, these allegations are vain and vexatory, but if they have knowledge of positive facts which would demonstrate these negatives, they should state them with sufficient particularity to enable the defendant to prepare counter evidence or other defence against them. As they stand, there is no possibility of making such preparation. How will the plaintiffs show that no such will as that of 1813 ever existed? It is difficult to imagine; and the defendant and her counsel are left to rack their brains to solve this difficult matter; whereas a brief and clear statement from the plaintiffs would dispel the mystery. It is made doubly perplexing by the allegation that if any other will that of 1813 ever existed, it was destroyed or suppressed by Clark himself. If the plaintiffs propose to content themselves with evidence of this suppres-
134 sion or destruction, then the preceeding allegations are useless and perplexing. They are perhaps even inconsistent with the fact of destruction. To shew that the alleged olographic will of 1813 never existed it may be that the plaintiffs expect to prove that at the time Clark was physically unable to write it, or that the paper seen by the witnesses was seen by others who know that it was forged or the like. If so, the fact should be stated. To show that the testimony of the witnesses is false, it may be that the ground is that they were persons of bad character, unworthy of credit, or that they could not read, or that they were bribed, or that they were not in the country at the time they say they saw the will, or that they contradicted their testimony in other depositions or declarations, or that the paper seen by the witnesses, though written by Clark, did not contain the testamentary disposi-
135 tions they say it did. There is no end to the surmises that may be made in regard to the particular grounds of disproof the plaintiffs may avail themselves of. Similar remarks would apply to the negative allegation that Daniel Clark never was married. Hence I will require the grounds mentioned to be stated with sufficient detail, and, if this is not done, will maintain the exception with regard to them.

VI.

I do not think that the plea of res judicata presented against the city of New Orleans is well founded.

The petition shows that the city of New Orleans is in possession of property derived from the succession of Clark under the will of 1811, other than that divested by the judgment on which the plea of res judicata rests. True, in that case the court declared in favor of Mrs.
136 Gaines, and against the city, that she was the legitimate heir & universal legatee of Clark; and the question is, whether the city can contest her capacity as heir and legatee in any suit thereafter?

It is to be observed that in the adjudged case the Supreme Court of the United States refused to take jurisdiction of the contested matter raised in this case, and declared itself incompetent to go behind and disregard the judgment of this court ordering the execution of the will of 1813.

They virtually decided that the city of New Orleans should have previously, if possible, have obtained a revocation or annulment of that judgment in the State courts; and, that as long as it stood, they would regard it as binding against the city. But what would that court do if the city, on the trial of the other cases, should present another judgment of this court, annulling the first? This court cannot pre-
137 tend to decide the question for the circuit court. It certainly belongs to that court to say what effect, if any, it would give to such a judgment. It might be that they would give it full effect, and this court would be doing a grievous wrong to the plaintiffs not to give them the benefit of a judgment in this case, if they are entitled to it, on the merits.

Indeed, the case adduced is not strictly one of res judicata, since "the thing demanded is not the same" in the pending suits as in the one decided. (Civil Code, 2264.) Hence the judgment in the decided case would be only evidence on the merits against the city in the others, but would not preclude counter-proof.

A counter-title or counter-proof subsequently procured would not be excluded, I think; but I say again this will be a question for the circuit court alone on the trial of these cases. It suffices for this court
138 to know that the thing demanded in this case has not been adjudicated in the record produced, and, according to that record, could not be adjudicated by that court. In the pending suits the annulment of the probate, if granted by this court, would be an entirely new ground of defence—a ground that did not exist at the time of the trial in the decided case. It would be like another title to the property in controversy. Certainly it will not be contended that if the city acquired another & new title to this property the judgment in the decided case for other property would prevent the new different title from being offered in evidence and being a ground of judgment. (See on this subject Hennen's Digest, p. 755, and cases there cited.)

The United States court, by its own decision, was not a competent court to try the cause of action and demand contained in the pe-
139 tition before me. Hence it could not intend that its judgment, in any case, could be taken as res judicata of this cause of action or demand.

It is therefore ordered that the defendant's exceptions be maintained so far as to require the plaintiffs to set forth specifically the grounds on which they base their allegations that the olographic will probated as made in 1813 by Daniel Clark, was a gross fraud; that it never existed;

that the testimony of the witnesses were false or erroneous; that he left no will posterior to that of 20th May, 1811, and that he was never married. That said grounds be set forth with sufficient detail to enable the court to judge of their materiality, and the defendant to prepare a defence and to meet them without surprise on trial; that the plaintiffs have ten days to comply with this order, and should they not
140 comply within that time, that the defendant's exception to the sufficiency of those clauses of the petition be finally maintained, unless further time for cause shown be granted by the court.

It is further ordered that in every other respect defendant's exceptions be overruled.

Decision of circuit court of the United States.—Filed with opinion & judgment on exceptions, January 3rd, 1871.

JOSEPH FUENTES & ALS.
vs.
MYRA CLARK GAINES.

This case is submitted on a rule nisi commanding the Hon. T. W Collens, judge of the seventh district court of the parish of New Orleans, sitting as judge of the second district court, to show cause why a peremptory mandamus should not issue requiring him to allow the
141 defendant, Myra Clark Gaines, to remove & transfer to the next term of this court the suit commenced by Joseph Fuentes and others against him in said second district court of the parish of New Orleans.

The petition of Fuentes & others in the second district court, to which Myra Clark Gaines was made defendant, was filed on the 27th day of May, 1869, and represents that petitioners are all residents of the city of New Orleans, in the State of Louisiana, and the defendant, Myra Clark Gaines, is a citizen of the State of New York, but, at the time of filing the petition, residing in the city of New Orleans; that the said defendant, on the 18th day of January, 1855, made application to said second district court for the probate of an alleged last will of Daniel Clark, dated July 13th, 1813, and upon a hearing before the supreme court of the State of Louisiana, obtained an order by which said
142 alleged last will was recognized as the last will and testament of said Daniel Clark, deceased, and directed to be recorded & executed as such.

That said order was obtained ex-parte, and by its terms authorized any person who at any time might desire to do so, to contest said will and the probate thereof, either in a direct action or as a means of defence, whenever said will should be set up as a muniment of title; that said defendant having obtained said order of probate, did, on or about the 22d day November, 1855, bring action against petitioners severally in the circuit court of the United States for the district of Louisiana, in which she set up said will as a muniment of title, and under the same claimed, and still claims, from petitioners sundry tracts of land situate in the parish of Orleans, of great value, and that the value of the interest of each petitioner in said property exceeds the sum of five hun-
143 dred dollars.

That petitioners are informed that they cannot contest the validity of said will in the said circuit court; and they represent that the probate of said will was a fraud upon their rights; that the evidence

on which the same was probated was false; that said Daniel Clark left no will other than the one dated May 20th, 1811, which was admitted to probate in said second district court on the 17th day of August, 1813, by which Mrs. Mary Clark, his mother, and his sole and legal heir, was instituted the universal legatee.

That said Daniel Clark was never married and had no legitimate child; that said Myra Clark Gaines was the issue of an adulterous connection, and said Daniel Clark did not and could not make a will in her favor, because she was without the capacity of inheriting or receiv-
144 ing by last will and testament from the said Daniel Clark.

The petition prays that said alleged will of July 13th, 1813, be revoked, and the probate thereof recalled as void and of no effect, and for general relief.

On the 8th of June, 1869, Mistress Gaines filed her petition in said district court, setting forth her right to, and asking to have said cause against her removed to the circuit court of the United States for the district of Louisiana. This petition was sworn to, and a bond was tendered by Mistress Gaines as required by law. The prayer of this petition for the transfer of the case to the circuit court was, on hearing, refused.

On the 17th of December, 1869, Mistress Gaines filed in the same court another petition asking for the removal of said cause to the U. S. circuit court, alleging that the matter in dispute exceeded the sum
145 of five hundred dollars, and that she had reason to believe, and did believe, that, from prejudice and local influence, she would not be able to obtain justice in said second district court; this petition was also accompanied by a bond as required by the statute, and was, on hearing, overruled.

The question presented for the decision of this court by the rule nisi is, whether the case, as presented by the petition of Joseph Fuentes, is one which, under the acts of Congress providing for the removal of causes from the State to the circuit court of the United States, can be so removed. The only acts of Congress which have any influence on this question are the act of 1789, section 12, and the act approved March 2d, 1869.

The act of March 3d, 1863, (12 Statutes, p. 756, 25,) and the 3rd section of the act of May 11th, 1866, (14 Statutes, p. 46, 53,) only apply to actions brought in a State court "against any officer, civil
146 or military, or against any other person for any arrest or imprisonment made, or other trespass or wrongs done or committed, or any act omitted to be done at any time during the rebellion by virtue or under color of any authority derived from or exercised by or under the President of the United States or any act of Congress."

The act of July 27th, 1866, (14 Statutes, 306,) which is limited by its terms to a suit commenced in a State court against an alien or by a citizen of the State, in which the suit is brought against a citizen of another State and citizen of the State in which the suit is brought, is also made defendant.

That is not the case in the suit now under consideration; so that we are remitted to the 12th section of the act of 1789, and the act of March, 2nd, 1867. The latter act contains all the material provisions of the 5th section of the act of 1789, and brings within the relief af-
147 forded by that section plaintiffs as well as defendants, and extends the time within which application may be made for the removal of a cause to any time before the final hearing or trial of the suit.

The application to remove this cause is made under the last-named act. All the conditions precedent for the removal of the cause have been complied with by Mistress Gaines, and the only question presented for the adjudication of this court is, whether the case is such a one as can be removed from a State to a Federal court. It is insisted that the act of Congress makes no exceptions; that by its terms it applies to all suits pending in any State court where there is a controversy between a citizen of the State where the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred
148 dollars, exclusive of costs, and that this court can make no exception when the law has made none.

In construing this law, we are authorized to look at all its provisions in order to arrive at the purpose of the law-making power in its enactment.

We think it is evident, from an inspection of the tenor of the law, that it was not intended to apply to a case like this.

It has been held by the courts that all the cases which fall within the tenor of the act are not subject to removal. In the case of the State of Pennsylvania vs. Cobbett, (3 Dallas, 467,) it was held by the supreme court of that State that an action of debt on a recognizance for good behavior, against an alien, was not removable by the defendant to the circuit court of the United States, it being in the nature of a criminal proceeding, and not such a case as was contemplated by the judicial act.

149 It is properly obvious, says Mr. Conklin, in his treatise, that no suit can be removed to the national court which might not, by the Constitution of the United States, have been originally commenced in one of these courts. It is true that Congress, in defining the original jurisdiction of the inferior courts of the United States, has not seen fit to cover the whole ground embraced by the Constitution. But it is evident, from the language of the 12th section of the judicial act, that it was not intended by it to extend the jurisdiction of these courts over causes brought before them on removal beyond the limits prescribed to their original jurisdiction.

It is clear that the United States courts are not invested with jurisdiction in probate matters. In Gaines vs. Chew, (2 Howard, 619,) the Supreme Court held that in Louisiana the court of probate had
150 exclusive jurisdiction in the proof of wills. If this suit had been brought in the first instance in this court, we do not see how the court could have entertained it. Thus, in Tarver vs. Tarver, 9 Peters, 174, the Supreme Court say: There is no color for annulling the will on the ground that it was conditional, & a bill cannot be sustained on the allegation that the probate is void. An original bill will not lie for this purpose. If any error was committed in admitting the will to probate, it should have been corrected by appeal in the State courts.

The act under which it is sought to remove this case to this court provides that after removal the suit shall proceed in the same manner as if it had been brought there by original process. This clearly implies that the action removed must be such a one as could have been brought
151 in the Federal court by original process.

On removal we are required to proceed as if the suit had been commenced here by original process. Now, suppose this case had been originally brought in this court, what would have been the result? The first proceeding of the court would have been to dismiss it for want of jurisdiction. So, if we remove the case here, it is our duty to proceed in the same way, namely, dismiss the cause. That is the only way in which

we can proceed if we follow the injunction of the law. We think this makes it clear that this suit is not embraced in the provisions of the acts of 1789 & 1867.

It is said in argument that the petition of Fuentes and others puts in issue the legitimacy of Mistress Gaines as well as the validity of the will of Daniel Clark. If this were so, we do not think it would give
152 this court jurisdiction. But an examination of the petition shows that its purpose, and only purpose, is to obtain judgment revoking the will of Daniel Clark and recalling the decree of probate. The grounds on which this is asked are: (1,) that the said will never existed as a will; that the testimony on which it was admitted to probate was false; and that Mistress Gaines, being the illegitimate child of Clark, had no capacity to receive or inherit, and therefore Daniel Clark did not, and could not, have made a will in her favor.

The only issue raised by the petition is on the validity of the will and the probate thereof, and the only decree which the court would pronounce would be on either affirming or denying the validity of the will and confirming or revoking the probate thereof.

153 The rule nisi must be dismissed.

A true copy of the original made by me.
(Signed) J. DEVONSHIRE,
Assistant Clerk U. S. Circuit Court.

Judgment on exceptions.

JOS. FUENTES & ALS. }
vs. } 32979.
MYRA C. GAINES. }

Second district court for the parish of Orleans.

For the reasons assigned in the written opinion of the court, this day delivered and on file—

It is ordered, that the defendant's exceptions be maintained so far as to require the plaintiffs to set forth specifically the grounds on which they base their allegations that the olographic will probated as made in 1813 by Daniel Clark was a gross fraud; that it never existed; that the testimony of the witnesses *were* false or erroneous; that he left no will posterior to that of 20th May, 1811; and that he was never married.

154 That said grounds be set forth with sufficient details to enable the court to judge of their materiality, and the defendant to prepare a defence and to meet them without surprise on trial; that the plaintiffs have ten days to comply with this order, and, should they not comply within that time, that the defendant's exception to the sufficiency of these clauses of the petition be finally maintained, unless further time for cause shown be granted by the court.

It is further ordered that in every other respect defendant exceptions be overruled.

Judgment rendered Jan'y 23rd, 1871.
Judgment signed Jan'y 27th, 1871.
(Signed) T. WHARTON COLLENS,
Judge of the Seventh District Court, acting in place of Judge Ls. Duvigneaud, recused.

Order for additional delay.—Filed February 2d, 1871.

155 JOSEPH FUENTES & ALS. } No. 32979.
vs.
MRS. MYRA C. GAINES. }

Second district court for the parish of Orleans.

On motion of Miles Taylor & J. McConnell, of counsel for the plaintiffs in the above-entitled suit, and on suggesting a reference to the order of this hon. court, on the 23rd ult., requiring a detailed and more specified statement of the grounds of certain allegations of the petition therein specified, and on further suggesting that the record of the suits necessary to be examined in order to furnish said details & specifications is very voluminous, and that sufficient time was not allowed in said order for the purposes therein contemplated, and that further time, say an additional delay of ten days, is necessary, and on suggesting further a reference to the affidavit annexed—

156 It is ordered by the court that the said plaintiffs be allowed a further & additional delay of ten days, to enable said plaintiffs to comply with said order.

Affidavit.

J. McConnell, being first duly sworn, deposes that he is one of the counsel herein above named; that said plaintiffs, through their said counsel, have used due diligence to examine the records & prepare the data necessary to enable them to comply with said order of this court, but have not had sufficient time to do so properly, and that for that purpose a further delay of ten days is necessary.

(Signed) J. McCONNELL.

Sworn to & subscribed at New Orleans, this 2d day of Feb'y, 1871, before me.

(Signed) JOE GARIDEL, *D'y Clerk.*

Order for additional delay.—Filed Feb'y 7th, 1871.

157 JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES. }

Second district court for the parish of Orleans.

On motion of J. D. Hill, of counsel for John Davidson & Jas. C. Davidson, intervenors herein, and on suggesting to the court that the delay herein granted to more specifically detail the grounds of certain allegations in their petition of intervention filed herein is insufficient, and on showing the order granted at instance of plaintiffs—

It is ordered, that a further delay of ten days be allowed said intervenors, to enable them to comply with said order.

Supplemental petition pursuant to the order of court.—Filed February 11th, 1871.

JOS. FUENTES & AL. vs. MYRA C. GAINES. } No. 32979.

Second district court for the parish of Orleans.

158 To the honorable the judge of the second district court for the parish of Orleans:

Now, in obedience to the order of this honorable court, herein rendered on the 23d ult., come the said plaintiffs, Jos. Fuentes, M. Esnard, A. Rochereau, J. L. Gubernator, the city of New Orleans, and others, named in the original petition herein filed, and also the other coplaintiffs herein named and referred to in the written stipulation, dated June 29th, 1870, & on file herein, and, for the purpose of complying with the said order, file this their supplemental petition, and say:

That the record-proof is so voluminous, the witnesses so numerous, and the incidents & details so many & varied, that they are unable to state, or even refer to them all in their pleadings, but that they will endeavor to set forth specifically the grounds on which the
159 allegation in the petition are based with sufficient detail to enable the court to judge of their materiality, and the defendant to prepare a defence & to meet them without surprise on the trial.

Proceeding, therefore, to give such specifications, your petitioners above named and referred to, say—

That the probate of said alleged will of 1813 was a gross fraud upon their rights, because important testimony and evidence, well known to said defendant and under her control, was withheld and suppressed, which, if offered, would have caused the rejection of the demand for said order of probate.

That among other evidence and testimony of that character, petitioners refer to and specify the following, to wit:

The testimony of François Dussau de la Croix, on file in this court, taken Sept. 28, 1835, in suit No. 843, entitled Whitney & wife (the present defendant) vs. E. O. Bearen & al.

160 The answers, under oath, made by Richard Relf and Beverly Chew in suit No. 122 in the circuit court of the United States, district of Louisiana, at the instance of said defendant herein, in a bill of discovery in chancery, wherein the issue was whether said alleged will of 1813 had been made or existed, or was lost or destroyed, and how; the Supreme Court of the United States ordering therein that said Myra C. Gaines, defendant herein, was entitled to full and explicit answers from said R. Relf & B. Chew, executors defendants in said bill, in regard to the wills of Daniel Clark, particularly in order that their answers, when obtained, might be used as evidence before the probate court to establish the will of 1813 and revoke that of 1811; that the said R. Relf & B. Chew were the testamentary executors of said D.
161 Clark under the will of 1811, and were also the agents and attorneys in fact of Mary Clark, the mother and sole testamentary and legal heir of said D. Clark, and, as such, were the parties through whom these petitioners derived title to the property now claimed by said defendant; that the answers of said Relf & said Chew, so taken, were not only good evidence upon the questions of the making, or the existence,

or the suppression of the said alleged will of 1813, but that the withholding of the same from this honorable court at the time of the making of the said application for said order of probate was in disregard and contempt of said order of the Supreme Court of the United States, and was a fraud upon the rights of petitioners.

The deposition of D. W. Cox and exhibits thereto annexed, taken in said suit No. 122, on the 25th August, 1849, when the issue was the making and existence of said alleged will of 1813, as above
162 stated, and was also in evidence in said suits 2619, 2695, & 2734.

In reference to the testimony of the witnesses offered by defendant in order to obtain said order of probate, petitioners specify as follows:

The testimony of the witness, Bellechasse, is false, being contradicted by declarations in his own letters on file as evidence in the suits 2619, 273, & 2695, in the circuit court of the United States, dist of La., which letters were written shortly after the death of said Daniel Clark.

The testimony of the witness S. B. Davis is contradicted by the record of the suit No. 1540, brought by him on the 24th June, 1817, in the then district court for the first judicial district of Louisiana, in which, as the tutor ad litem of said defendant, he claimed from said executors, Relf & Chew, alimony for the said defendant as the natural child of said Daniel Clark.

163 The testimony of the witness Smythe is contradicted, and her credibility impeached, by the testimony of Peter A. Browne, of Philadelphia, whose testimony was taken contradictorily between said defendant and sundry of the plaintiffs herein in the said suits 2734 and 2695; and that, in so far as the said witness was sought to be made a witness to said alleged will of 1813, she was absolutely incapable in law to testify.

That not one of the witnesses attested that they recognized the testament, or that they recollected the said alleged last will "as being entirely written, dated, and signed in the handwriting, as having often seen him write and sign during his life-time," as the law required.

Your petitioners further specify that the paper seen by defendant's witnesses, which they speak of as the will of 1813, was not
164 a will, but a mere unsigned project, which the said Daniel Clark submitted to his then counsel, who advised against its completion because of absolute incapacity in the said Myra to inherit anything from him, and thereupon said Clarke made for her, as his illegitimate child, ample provision, as stated in the petition, by secret trusts of property to Bellechasse and De la Croix & S. B. Davis, all which property defendant subsequently received from De la Croix on or about the 16th May, 1820, and from Bellechasse on or about the 4th June, 1833.

Petitioners further say that said D. Clark left no will dated in 1813, as is pretended; but that, if he did, which they deny, then they aver the same was and is null and void for the reasons stated in the petition, & for the further reasons that the said Daniel Clark was never
165 married to the mother of the defendant, Myra; that, at the date of the birth of said defendant, and for many years prior thereto, the mother of the defendant was the lawful wife of Jerome des Grangi, having been married to said Des Grange, in the city of New Orleans, in Dec., 1794, and that said defendant was born during the existence of said marriage; that said petitioners can prove by the reputation of said Clark, and also by his declarations, his letters, and conduct, that he was not married to any one—certainly not to the mother of the defendant, Zulime Carrière des Grange; and that, if said defendant was, as 'he

alleges herself to be, the child of said Daniel Clark, then she was, as stated in the petition, the issue of an adulterous connection, and as such absolutely incapacitated by law from inheriting, by last will and
166 testament, from said Daniel Clark; and that even if the said Daniel Clark did make the alleged will of July, 1813—which is not admitted—and in it declared that the defendant was his legitimate child, such declaration of legitimacy was and is untrue, and of no effect, and such will, if made—which is denied—was and is inoperative & void, because forbidden by law, and because in fraud of the rights of Mary Clark, the mother, and forced heir as well as sole testamentary & legal heir *heir* of said Daniel Clark, and in possession of his estate under the will of 1811, and in fraud of the rights of these petitioners, holding titles as purchasers in good faith from & under the said Mary Clark, and as such now disturbed in the enjoyment of their just rights by said defendant by suits against them in the courts of the United States based
167 upon said ex-parte order of probate, as shown in the petition.

Your petitioners further specify that the status of illegitimacy of said defendant, as in the petition and herein above stated, is further proved by the circumstances of her birth and early life; by the declarations of said Daniel Clark in regard to her; by his conduct towards her; by his refusal to acknowledge her publicly as his child, or to give her his name, or any name by the rite of baptism; by the fact that she is not mentioned or referred to in any one of his numerous letters, nor in the real will of 1811.

That said status of illegitimacy of said defendant is further shown by the conduct of her mother, the said Zulime, who, being married to Jerome Des Grange in 1794, as above stated, did, on or about the 30th November, 1805, bring suit against her said husband for an allow-
168 ance of alimony as such; and on or about the 24th June, 1806, did bring another suit against her said husband Des Grange, as such, and did ask and obtain a decree of divorce from said Des Grange as her husband, and subsequently, to wit, on the 2d Aug't, 1808, did intermarry with Dr. Jas. Gardette, in Phila'a, & lived with him as his lawful wife until long after the death of said Daniel Clark. That the said Daniel Clark did not object to the marriage of said Mrs. Des Grange with Dr. Gardette, as it is most likely he would have done had she been his wife, but, on the contrary, is shown, about the same period, to wit, in 1807 and 1808, to have addressed and proposed marriage himself to Miss Caton of Baltimore; and that conclusive proof of the fact that said Daniel Clark was not married at the time of the birth
169 of the defendant is shown by his letter to his sister, Jane Clark, dated October 14, 1805, in which he declares that he was not married.

Wherefore, your petitioners above named and referred to, asking leave to file this their supplemental petition, prepared by them in pursuance of and in obedience to the order of this honorable court, pray that due service hereof and citation be made upon the said defendant, Myra C. Gaines, and, after all due process of law, that the prayer of the original petition herein filed be granted, asking that judgment may be rendered revoking the said pretended will of July thirteenth, 1813, and recalling the said decree of probate thereof as absolutely void and of no effect in law.

(Signed) MILES TAYLOR,
J. McCONNELL,
Of Counsel for Petitioners.

170 *Order rendered on foregoing supplemental petition.*

Let this supplemental petition be filed.
New Orleans, February 11th, 1871.
(Signed) T. WHARTON COLLENS,
Judge of the Second District Court for the Parish of Orleans, sitting in the place of Hon. L's Duvigneaud, Judge of said Court, recused in this case.

Citation.

State of Louisiana, second district court for the parish of Orleans.

JOS. FUENTES & AL. } No. 32979.
vs.
MYRA C. GAINES. }

To Mrs. Myra C. Gaines, of N. O.:

You are hereby summoned to comply with the demand contained in the supplemental petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the
171 second district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable T. W. Collens, judge of the said court, the 13th day of February, in the year of our Lord 1871.
(Signed) M. O. TRACY, *Clerk.*

Sheriff's return on above citation.

Rec'd February 13th, 1871, and on the 14th day of February, 1871, served a copy of the within citation and accompanying supplemental petition personally on Mrs. Myra C. Gaines, defendant herein.
Returned same day.
(Signed) H. K. NIXON,
D'y Sheriff.

Supplemental petition of John & Jas. C. Davidson, intervenors.—Filed February 14th, 1871.

JOS. FUENTES & AL. } No. 32979.
vs.
MYRA C. GAINES. }

172 Second district court for the parish of Orleans.

To the honorable the judge of the second district court for the parish of Orleans:

Now, in obedience to the order of this honorable court herein rendered on the 23rd ult., come the said intervenors, John Davidson, of the city of New Orleans, and Jas. C. Davidson, of the city of New York, lately composing the commercial firm of J. & J. C. Davidson, domiciled in this city, and for the purpose of complying with the said order file this their supplemental petition, and say—

That, reiterating all the allegations and the prayers of their original petition in intervention herein filed, and which they do now make a part

hereof, further aver that the record proof is so voluminous, the witnesses so numerous, and the incidents and details so many & varied, that
173 they are unable to state or even refer to them all in their pleadings, but that they will endeavor to set forth specifically the grounds on which the allegations in the petition in intervention are based with sufficient detail to enable the court to judge of their materiality and the defendant to prepare a defence and to meet them without surprise on the trial.

Proceeding, therefore, to give such specifications, your petitioners in intervention aboved named say—

That the probate of said alleged will of 1813 was a gross fraud upon their rights, because important testimony and evidence well known to said defendant, and under her control, was withheld & suppressed, which, if offered, would have caused the rejection of the deceased for said order of probate.

That among other evidence & testimony of that character, petitioners
174 refer to & specify the following, to wit:

The testimony of François Dussau de la Croix, on file in this court, taken Sept. 28th, 1835, in suit No. 843, entitled Whitney & wife (the present defendant) vs. E. O. Bearne & al.

The answers under oath made by Richard Relf and Beverly Chew in suit No. 122 in the circuit court of the United States, dist. of La., at the instance of said defendant herein, in a bill of discovery in chancery, wherein the issue was whether said alleged will of 1813 had been made or existed, or was lost or destroyed, & how; the Supreme Court of the United States ordering therein that said Myra C. Gaines, defendant herein, was entitled to full and explicit answers from said R. Relf & B. Chew, ex'rs, defendants in said bill, in regard to the wills of Daniel Clark, particularly in order that their answers, when obtained,
175 might be used as evidence before the probate court to establish the will of 1813, and revoke that of 1811. That the said R. Relf and B. Chew, under the will of 1811, were the testamentary executors of said D. Clark, and were also the agents and attorneys in fact of Mary Clark, the mother & sole testamentary and legal heir of said D. Clark, and as such were the parties through whom these petitioners in intervention derived title to the property now claimed by said defendant. That the answers of said Relf and said Chew so taken were not only good evidence, upon the questions of the making, or the existence or the suppression of the said alleged will of 1813, but that the withholding of the same from this hon. court, at the time of the making of the said application for said order of probate, was in disregard and contempt of said order of the Supreme Court of the United States, and was
176 a fraud upon the rights of petitioners in intervention.

The deposition of D. W. Coxe, and exhibits thereto annexed, taken in said suit No. 122, on the 25th August, 1849, when the issue was the making and existence of said alleged will of 1813, as above stated, and was also in evidence in said suits, 2619, 2695, & 2734.

In reference to the testimony of the witnesses offered by defendant in order to obtain said order of probate, petitioners in intervention specify as follows:

The testimony of the witness Bellechasse is false, being contradicted by declarations in his own letters on file as evidence in the suit 2619, 2734, & 2695 in the circuit court of the United States, district of La., which letters were written shortly after the death of said D. Clark.

The testimony of the witness, S. B. Davis, is contradicted by the record of the suit No. 1540, brought by him on the 24th June, 1817,

177 in the then district court for the first judicial district of Louisiana, in which, as the tutor ad litem of said defendant, he claimed from said executors, Relf & Chew, alimony for the said defendant as the natural child of said Daniel Clark.

The testimony of the witness Mrs. Smythe is contradicted, and her credibility impeached by the testimony of Peter A. Browne, of Philadelphia, whose testimony was taken contradictorily between said defendant and sundry of the plaintiffs herein, in the said suits, 2734 & 2695, and that in so far as the said witness was sought to be made a witness to said alleged will of 1813, she was absolutely incapable in law to testify.

That not one of the witnesses attested that they recognized the testament, or that they recollected the said alleged last will "as being
178 entirely written, dated, & signed in the testator's handwriting, as having often seen him write & sign during his life-time," as the law requires.

Your petitioners in intervention further specify that the paper seen by defendant's witnesses, which they speak of as the will of 1813, was not a will, but a mere unsigned project which the said Daniel Clark submitted to his then counsel, who advised against its completion, because of absolute incapacity in the said Myra to inherit anything from him, & thereupon said Clark made for her, as his illegitimate child, ample provision, as stated in the petition, by special trusts of property to Bellechasse & De la Croix, & S. B. Davis, all which property defendant subsequently received from de la Croix on or about the 16th May, 1820, & from Bellechasse on or about the 4th June, 1833.

Petitioners further say that said D. Clark left no will dated
179 in 1813, as is pretended, but that if he did, which they deny, then they aver the same was and is null & void, for the reasons stated in the petition in intervention, & for the further reasons that the said Daniel Clark was never married to the mother of the defendant Myra; that at the date of the birth of said defendant, and for many years prior thereto, the mother of the defendant was the lawful wife of Jerome Des Grange, having been married to said Des Grange in the city of New Orleans, in Dec., 1794, & that said defendant was born during the existence of said marriage; that petitioners in intervention can prove by the reputation of said Clark, and also by his declarations, his letters, and conduct, that he was not married to any one—certainly not to the mother of the defendant Zulime Carrière Des Grange,
180 and that if said defendant was, as she alleges herself to be, the child of said Daniel Clark, then she was, as stated in the petition in intervention, the issue of an adulterous connection, and as such absolutely incapacitated by law from inheriting by last will & testament from said Daniel Clark, and that, even if the said Daniel Clark did make the alleged will of July, 1813, which is not admitted, and in it declared that the defendant was his legitimate child, such declaration of legitimacy was & is untrue, & of no effect, and such will, if made, which is denied, was and is inoperative & void, because forbidden by law, and because in fraud of the rights of Mary Clark, the mother, & forced heir as well as sole testamentary & legal heir of said Daniel Clark, and in possession of his estate under the will of 1811, and in fraud of the rights of these petitioners in intervention holding titles as pur-
181 chasers in good faith from & under the said Mary Clark or her assigns, and as such now disturbed in the enjoyment of their just rights by said defendant by suits against them in the courts of the United States, based upon said ex-parte order of probate as shown in the petition in intervention.

Your petitioners in intervention further specify that the status of illegitimacy of said defendant, as in the petition in intervention & herein above stated, is further proved by the circumstances of her birth and early life, by the declarations of said Daniel Clark in regard to her, by his conduct towards her, by his refusal to acknowledge her publicly as his child, or to give her his name, or any name by the right of baptism; by the fact that she is not mentioned or referred to in any one of his numerous letters, nor in the real will of 1811.

182 That said status of illegitimacy of said defendant is further shown by the conduct of her mother, the said Zulime, who, being married to Jerome Des Grange in 1794, as above stated, did, on or about the 30th November, 1805, bring suit against her said husband for an allowance of alimony as such; and on or about the 24th June, 1806, did bring another suit against her said husband, Des Grange, as such, and did ask and obtain a decree of divorce from said Des Grange as her husband, and subsequently, to wit, on the 2d August, 1808, did intermarry with Dr. James Gardette in Phila'a, & lived with him as his lawful wife until long after the death of said Daniel Clark; that the said Daniel Clark did not object to the marriage of said Mrs. Des Grange with Dr. Gardette, as it is most likely he would have done had she been his wife, but, on the contrary, is shown about the same period, to

183 wit, in 1807 & 1808, to have addressed & proposed marriage himself to Miss Caton, of Baltimore, and that conclusive proof of the fact that said Daniel was not married at the time of the birth of the defendant is shown by his letter to his sister, Jane Clark, dated October 14th, 1805, in which he declares that he was not married.

Wherefore your petitioners in intervention, asking leave to file this their supplemental petition in intervention, prepared by them in pursuance of and in obedience to the order of this honorable court, pray that due service hereof & of their original petition in intervention & citation be made upon the said defendant, Myra C. Gaines, and, after all due process of law, that the prayer of the original petition in intervention herein filed be granted, asking that judgment may be rendered revoking the said pretended will of July thirteenth, 1813, and

184 recalling the said decree of probate thereof as absolutely void and of no effect in law.

(Signed) JAMES D. HILL,
Atty. for Intervenors.

Order rendered on foregoing petition.

Let this supplemental intervention be filed.
New Orleans, Feb'y 14th, 1871.
(Signed) T. WHARTON COLLENS, *Judge.*

Citation.

State of Louisiana, second district court for the parish of Orleans.

JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

To Mrs. Myra C. Gaines, of N. O.:

You are hereby summoned to comply with the demand contained in the original & supplemental intervention of J. & J. C. Davidson,

185 of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable T. W. Collens, judge of the said court, the 15th day of February, in the year of our Lord 1871.

(Signed) M. O. TRACY, *Clerk.*

Sheriff's return on above citation.

Received Feb'y 15th, 1871, and on the same day, month, and year served copy of the within citation & accompanying petition on Myra Clark Gaines in person.

Returned same day.

(Signed) A. L. YOUNG,
Dept. Shff.

Plea of oyer on part of deft.—Filed February 21st, 1871.

JOS. FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

186 Second district court for the parish of Orleans.

And now to the supplemental and amended petition of Joseph Fuentes & als., plaintiffs, and to the amended & supplemental petition of J. & J. C. Davidson, intervenors in the above-entitled cause, filed by order of court on the 11th & 14th February, 1871, respectively, comes Myra Clark Gaines, and pleading to the same each and every, the plea to jurisdiction of this court and the exceptions herein filed to the original petitions, and reserving her rights at all times under the same; now before pleading, excepting, or answering said supplemental & amended petitions, prays oyer of the several documents, letters, & papers referred to in said amended petitions, but not annexed thereto nor filed in this cause, and specially to the following: All and singular the alleged letters of said Daniel Clark, including the alleged letter of the
187 14th October, 1805, to Jane Clark; and also if in writing or published and printed, all declarations of said Daniel Clark on which said plaintiffs & intervenors intend to offer in evidence as proof of the allegations in their original and supplemental petitions, as said documents, letters, and papers are, as respondent has been informed by her counsel, necessary to be examined in order to properly plead, except, or answer said amended petitions.

Wherefore respondent prays that this, her prayer for oyer, be granted, and that she be excused from pleading, excepting, or answering herein until the filing in this court by said plaintiffs and intervenors said documents, letters & papers, and for all orders required in the premises.

(Signed) RACE, FOSTER & E. T. MERRICK,
FELLOWS & MILL.

Myra Clark Gaines, being duly sworn, says that the allegations in the foregoing prayer of oyer are true.

(Signed) MYRA CLARK GAINES.

188 Sworn to & subscribed before me this 21st day of Feb'y, 1871.

(Signed) W. L. EVANS,
Second Justice Peace, Parish of Orleans.

Order of court on foregoing plea, &c.

It is ordered, that the plaintiffs and intervenors do produce & file the letters, documents, titles, & other writings described in the above prayer within twenty days from service of a copy of this order, or shew cause in the mean time in writing why they should not be excused and dispensed from doing so, and that in the mean time defendant be dispensed from pleading, excepting, or answering.

New Orleans, 21st Feb'y, 1871.

(Signed) T. WHARTON COLLENS,
Judge acting in place of Judge Duvigneaud, recused in this case.

Sheriff's return on foregoing plea, &c.

189 Received February 23rd, 1871, and on the same day, month, & year served copy of the within supplemental & amended petition on J. D. Hill, atty., in person.

Returned same day.

(Signed) J. PAULIN EXNICIOS, *D'y Sh'ff.*

And on the 24th day of same month & year served copy of the within supplemental and amended petition on Miles Taylor, atty., in person.

Returned same day.

(Signed) J. P. EXNICIOS, *D'y Sheriff.*

Petition for removal of cause.—Filed February 24th, 1871.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

And now into court by the undersigned, her counsel, comes Myra Clark Gaines, and as against the additional plaintiffs, whose
190 names are set forth in the private agreement of counsel of 29th June, 1870, on file, and before further answering or appearing, alleges that she is a citizen of the said of New York, and said plaintiffs are citizens of the State of Louisiana, *now are to* and were at the time of and previous to their appearance herein as plaintiffs; and further respondent alleges that from prejudice and local influence she will not be able to obtain justice in this honorable court in the issues raised and involved in both the original and supplemental petitions, and alleging the same allegations against said Joseph Fuentes & als., original plaintiffs, as to their supplemental petition filed herein on the 11th February, 1871, and to the supplemental petition filed by J. & J. C. Davidson, intervenors, in this cause, on the 14th February, 1871, and which said original plaintiffs & Jos. Fuentes & als. are citizens of
191 Louisiana, and J. & J. C. Davidson, a commercial firm doing business in this city & parish, and of which firm said John Davidson is a citizen of the State of Louisiana, she desires to claim the benefit of the laws of the United States, and specially of the twelfth section of the act of Congress entitled "An act to establish the judicial courts of the United States," approved September 24th, 1789, and the act entitled "An act to amend an act entitled 'An act for removal of causes in certain cases from State courts, approved July 27th, 1844,'" approved

March 2nd, 1867—desires and now petitions for removal of said cause from this honorable court to the next term of the honorable the United States circuit court for the district of Louisiana.

Wherefore respondent, the annexed affidavit & bond considered, prays that said cause and suit be removed from this honorable court to
192 the next term of the United States circuit court for the district of Louisiana, and for all orders required in the premises.

(Signed) FELLOWS & MILLS.
RACE, FOSTER & E. T. MERRICK.

Myra Clark Gaines, being duly sworn, says, that all and singular the allegations in the foregoing petition are true.

(Signed) MYRA CLARK GAINES.

Sworn to & subscribed before me this 24th day of Feb'y, '71.

(Signed) W. L. EVANS,
2d Justice Peace, Parish of Orleans.

Bond for removal of cause.—Filed February 24th, 1871.

JOS. FUENTES
vs.
MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

Know all men by these presents that we, Myra Clark Gaines, a citizen of New York, as principal, and William Reed Mills, of the
193 city of New Orleans, as surety, are held and firmly bound unto Jos. Fuentes & als., plaintiffs in the suit of Jos. Fuentes & others vs. Myra Clark Gaines, No. 32979 of the docket of the second district court for the parish of Orleans, and J. & J. C. Davidson, intervenors in said suit, and all parties interested therein, in the sum of five hundred dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated in the city of New Orleans on this 24th February, 1871.

Whereas the above bounden Myra Clark Gaines has this day filed a petition to have removed from the second district court for the parish of Orleans to the next circuit court of the United States for the district of Louisiana, the said certain suit pending in said second district court for the parish of Orleans, entitled & numbered Joseph
194 Fuentes & als. vs. (32979) Myra Clark Gaines.

Now the condition of the above obligation is such that if said Myra Clark Gaines shall enter in said circuit court, on the first day of its next session, copies of said suit & process against her, this bond & obligation shall be null & void. Otherwise to remain in full force and effect.

(Signed) MYRA CLARK GAINES.
WM. REED MILLS.

Order rendered on petition to remove.

This is only a renewal of the petition previously filed and refused by this court and by the circuit court of the United States in this circuit.

It is, therefore, for the same reasons given in the first instance, also refused.

New Orleans, 24th Feb'y, 1871.

(Signed) T. WHARTON COLLENS, *Judge.*

195 *Answer to prayer & order for oyer of documents.—Filed March 6th, 1871.*

JOS. FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

Second district court for the parish of Orleans.

Now come the said plaintiffs named in the original and supplemental petitions, and referred to therein as co-plaintiffs, by stipulation of record herein, and for answer to the prayer for oyer, and in obedience to the order of this hon. court herein rendered on the 21st ult., say:

That the several documents, letters, papers, & other writings are not in the possession nor under the control of these appearers, but are, with the exceptions hereinafter specified, in the official custody of the clerk of the circuit court of the United States for the district of Louisiana, and are in evidence, and on file, & of record in the
196 said circuit court in the said suits, 122, 2619, 2695, & 2734, referred to & as stated in said original & supplemental petition, and that said clerk refuses to part with the same.

These appearers, the said plaintiffs, further say that all the said documents, papers, &c., were duly introduced in evidence, and are to be found in the copies of the said records of said circuit court, as printed for the use of the Supreme Court of the U. S., & used on appeal before said Supreme Court; and that, on the 29th day of June, 1870, as appears from stipulations of record herein, said defendant, Myra Clark Gaines, through her counsel, agreed formally & in writing with these plaintiffs, through their counsel of record, with the view of saving costs and delay, & for the convenience of all parties & of the court, that the printed records of the said Gaines' cases, so used before the Supreme Court of the United States, should be offered & used in
197 evidence as prima facie correct, in lieu of the originals so printed in said records, in all cases in which the original' themselves would be admissible herein.

Further answering, they say that as to the letter of Daniel Clark to Jane Clark, dated October 14th, 1805, the original letter appears to have been lost in the manner stated in the testimony of the witness Seth Barton, and a copy thereof substituted being proved by the testimony of the witnesses Horatio Davis and John Barnes, all which testimony of said Burton, Davis, & Barnes, as well as the other documentary evidence & testimony referred to, was originally taken in the said suit 122, and afterwards also introduced in evidence in said suits 2619, 2695, & 2734.

Further answering, they say that very many of the original letters of said Daniel Clark, together with the commercial books of Relf
198 & Chew, of which he was a member, are in the possession or under the control of the said defendant, as appears from the order of date, Aug't 1, 1865, rendered by said circuit court in said suit 2695, by which said defendant obtained possession of the same, subject to the express condition that she should return the same to the said circuit court; that said letters and said books, the possession of which was thus obtained by said defendant, have not yet been returned to said circuit court, and, therefore, cannot be produced by said plaintiffs.

Further answering, they say that the documentary evidence and testimony by which they expect to prove the declarations & conduct

of said Daniel Clark, as specified in the petition and supplemental petition, were introduced in evidence in said suits 122, 2619, 2695, & 2734, in the U. S. circuit court, and are to be found in the printed copy of said records, as used before the U. S. Supreme Court, herein-
199 above referred to.

Wherefore these appearers pray that this explanation & statement be taken as a full and complete answer to the said prayer for oyer & order thereon, rendered on the 21st of February, 1871, & that said defendant be cited to appear on Tuesday, the 7th day of March, 1871, at ten o'clock a. m., to show cause why this statement should not be so taken & held as a full and complete answer to said prayer for oyer & order thereon, & why she should not plead or answer, & the trial of the cause be proceeded with, & for general relief.

(Signed) M. TAYLOR &
J. McCONNELL,
For Petitioners.

Service accepted on within answer & rule.
March 6th, 1871.
(Signed) FELLOWS & MILLS.

200 *Order to plead, &c., as entered in the minutes of March 7th*, 1871.

JOSEPH FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

Second district court for the parish of Orleans. Hon. T. W. Collins, judge of the seventh district court, presiding in place of his honor Judge L's Duvigneaud, recused.

In the answer filed by the plaintiffs to prayer & oyer of documents, the said plaintiffs having cited defendant to appear this day to shew cause why the statement contained in their answer should not be taken as a full & complete answer to prayer for oyer and order thereon, and why she should not plead or answer, and the trial of the case be proceeded with, the matter came up—J. McConnell, esq., for plaintiffs; Fellows & Mills, esqrs., for defendants—when, after hearing counsel, the court considering the object of the oyer to be accom-
201 plished, orders defendant to plead or answer within three days from date hereof.

Exceptions.—Filed March 8th, 1871.

JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

Second district court for the parish of Orleans.

And now Myra Clark Gaines, defendant in the above entitled and numbered case, a citizen of the State of New York, first reserving now and at all times her right to the removal of this cause from this honorable court to the United States circuit court for the fifth circuit & district of Louisiana, as hereinbefore, to wit, on the 8th June, 1869, 17th December, 1869, and the 24th February, 1871, by her petitioned for, and refused by this honorable court, and now and at all times reserving

her right to legal relief against said refusals, and only now ap-
202 pearing under order of this honorable court, and to the supplemental and amended petition of the plaintiffs Joseph Fuentes & als., filed on the 11th Feb'y, 1871, and of J. & J. C. Davidson, intervenors, filed on the 14th Feb'y, 1871, and to original & supplemental petitions of the previous-made parties plaintiffs under the written statement and agreement of the 29th June, 1870, renews and pleads to the further jurisdiction of this court in the premises to several petitions of respondent for the removal of this cause to the United States circuit court for the district of Louisiana, of the said 8th June, 1869, 17th Dec., 1869, and the 24th February, 1871; and in case of the overruling of said exception, the further exception of want of jurisdiction of this court, ratione materiæ, and as fully set forth in the said exceptions so filed on the 26th March, 1870.

And in case said exception be overruled, then respondent, by
203 way of exception to further answering herein, says that the allegations set forth by the parties, plaintiffs and intervenors, in their respective petitions, are inconsistent in their character, and specially in this, that said petitions allege that there was no will of said Daniel Clark subsequent in date to the will of 1811; and subsequently it is alleged in said petitions that if there was such a will, to wit, the will of July, 1813, the defendant was incapable of taking under said will, and that it was void, inoperative, and forbidden by law. And now respondent alleges that said respective allegations *and* inconsistent and insufficient in law to compel defendant to answer the same; that plaintiffs and intervenors should be held to positive and not hypothetical allegations, and should be held to elect and rely upon one or
204 the other of the following grounds, to wit: 1st, either that the will of 1813 did not exist, or, 2d, that it did exist and was inoperative and void for the causes alleged. And until plaintiffs and intervenors elect which one of these supposed causes of action they will rely on and pursue, defendant is not further bound to plead, except, or answer.

Wherefore respondent prays judgment in her favor on the foregoing pleas to the jurisdiction of this court; and in case of the same being overruled, she prays that plaintiffs and intervenors be ordered and required to elect which one of the before-mentioned causes of action they will pursue, and, till which said election, respondent be dispensed from further pleading, excepting, or answering in this cause.

(Signed) RACE, FOSTER, & E. T. MERRICK,
FELLOWS & MILLS,

Attys.

205 *Answer to prayer & order for Oyer.—Filed March 9th*, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL.
vs.
MYRA CLARK GAINES. } No. 32979.

Now into court come the plaintiffs in intervention, and for answer to the prayer for oyer, and in obedience to the order of this honorable court herein rendered on the 21st ulto., say:

That the several documents, letters, papers, and other writings are not in the possession nor under the control of these appearers, but are, with the exceptions hereinafter specified, in the official custody of the clerk of the circuit court of the United States for the district of La., and

are in evidence & on file & of record in the said circuit court in the said suits 122, 2619, 2695, & 2734 referred to & as stated in said original and supplemental petition, and that said clerk refuses to part with the same.

These appearers, the said plaintiffs, further say that all the said documents, papers, &c., were duly introduced in evidence, and are to be found in the copies of the said records of said circuit court, as printed for the use of the Supreme Court of the U. S., & used on appeal before said Supreme Court; and that, on the 29th day of June, 1870, as appears from stipulations of record herein, said defendant, Myra Clark Gaines, through her counsel, agreed formally and in writing with these plaintiffs, through their counsel of record, with the view of saving costs & delay, and for the convenience of all parties & of the court, that the printed records of the said Gaines cases so used before the Supreme Court of the United States, should be offered and used in evidence as prima facie correct, in lieu of the original, so printed in the said records, in all cases in which the originals themselves would be admissible herein.

Further answering, they say that as to the letter of Daniel Clark to Jane Clark, dated October 14th, 1805, the original letter appears to have been lost in the manner stated in the testimony of the witness Seth Barton, & a copy thereof substituted, being proved by the testimony of the witnesses Horatio Davis & John Barnes, all which testimony of said Barton, Davis, & Barnes, as well as the other documentary evidence and testimony referred to, was originally taken in the said suit 122, and afterwards also introduced in evidence in said suits 2619, 2695, & 2734.

Further answering, they say that very many of the original letters of said Daniel Clark, together with the commercial books of Relf & Chew, of which he was a member, are in the possession and under the control of the said defendant, as appears from the order of date Aug't 1st, 1865, rendered by said circuit court in said suit 2695, by which said defendant obtained possession of the same, subject to the express condition that she would return the same to the said circuit court; that said letters & said books, the possession of which was thus obtained by said defendant, have not yet been returned to said circuit court, and therefore cannot be produced by said plaintiffs.

Further answering, they say that the documentary evidence & testimony by which they expect to prove the declarations and conduct of said Daniel Clark as specified in the petition & supplemental petition, were introduced in evidence in said suits 122, 2619, 2695, & 2734, in the U. S. circuit court, and are to be found in the printed copy of said records, as used before the U. S. Supreme Court hereinabove referred to.

Wherefore these appearers pray that this explanation & statement be taken as a full and complete answer to the said prayer for oyer therein rendered, on the 21st day of Feb'y, 1871, and that said defendant be cited to appear on Tuesday, the 14th day of March, 1871, at 10 o'clock a. m., to shew cause why this statement should not be so taken & held as a full & complete answer to said prayer for oyer & order therein, and why she should not plead or answer, & the trial of the cause be proceeded with, and for general relief.

(Signed) J. D. HILL,
Atty. for J. & J. C. Davidson.

Service accepted on within answer & rule.
March 9th, 1871.
(Signed) FELLOWS & MILLS.

Motion to fix for trial.

210 The exceptions filed March 8th, 1871, as entered in the minutes of M'ch 13th, '71.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS.
vs.
MRS. MYRA C. GAINES. } No. 32979.

On motion of M Taylor and J. McConnell, of counsel for plaintiffs: It is ordered by the court that the exceptions & prayer to elect, filed on the 8th instant, by the said defendant be fixed for trial on Saturday, the 25th day of March, 1871, at 10 o'clock a. m., and that the said defendant be notified.

Notice of trial of exceptions, &c.

State of Louisiana, second district court for the parish of Orleans.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

To Mrs. Myra Clark Gaines:

211 Please take notice that the exceptions filed on the 8th day of March, 1871, in the above-entitled cause, are fixed for trial on the 25th day of March, 1871.

New Orleans, March 13th, 1871.

(Signed) L. ARNAULD,
D'y Clerk.

Sheriff's return on above citation.

Received March 14th, 1871, and on the 14th day of March, 1871, served copy of the within notice of trial on Mrs. Myra C. Gaines, defendant herein, through J. Q. A. Fellows, atty., in person.

Returned same day.

(Signed) H. K. NIXON,
D'y Sheriff.

Order, exceptions, &c., continued, as entered in the minutes of M ch 25, '71.

Second district court for the parish of Orleans. Hon. T. W. Collens, presiding, in place of his honor Judge Ls. Duvigneaud, recused.

JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

212 By consent of counsel, it is ordered that the exception & prayer to elect, fixed for this day, be continued to Saturday next, the 1st April, 1871, at eleven o'clock a. m.

Order, exceptions, &c., continued, as entered in the minutes of April 1st, '71.

Second dist. court for the parish of Orleans. Hon. T. W. Collens, presiding, in place of his honor Judge Ls. Duvigneaud, recused.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

It is ordered by the court that the exceptions & prayer to elect, fixed for trial for this day, be continued indefinitely.

Order, exceptions, &c., dismissed, as entered in the minutes of Ap'l 15th, '71.

Second district court for the parish of Orleans. Hon. T. W. Col-
213 lens, presiding, in place of his honor Judge Ls. Duvigneaud, recused.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

This case came up this day for trial on the exceptions & prayer to elect, filed by defendant, all parties being represented in open court, when, after hearing arguments of counsel, & for the reasons assigned orally in open court, it is ordered that the matter be dismissed & that the defendant have fifteen days from date hereof to file her answer to plaintiffs' petition.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

Supplemental petition of intervention.—Filed April 15th, 1871.

Second district court for the parish of Orleans.

To the honorable the judge of the second district court for the parish of Orleans:

The supplemental and amended petition of intervention of Mrs.
214 Charles Mathews for herself, and as natural tutrix of her five minor children, respectfully represents:

That, reiterating all her allegations & prayers of her original petition of intervention herein filed, & which she now does make part hereof, she adopts all the facts, and allegations, and prayers of the amended supplemental petition of intervention of John Davidson and Jas. C. Davidson, filed herein on 14th Feb'y, 1871, and prays for citation & judgment as therein prayed for.

(Signed) DIRRHAMMER & KENNARD,
Attys. for Pet'r.

Order.

Let this supplemental petition of intervention be filed.
New Orleans, April 15th, 1871.
(Signed) T. WHARTON COLLENS,
Judge of the 7th District Court for the Parish of Orleans, Acting in place of the Judge of the Second District Court, Recused.

215 *Answer & plea of prescription.—Filed April 29th*, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

And now Myra Clark Gaines, defendant in the above-entitled and numbered cause, first reserving now and at all times her right to the removal of this cause from this honorable court to the United States circuit court for the fifth circuit and district of Louisiana, as herein, to wit, on the 8th June, 1869, 17th December, 1869, and at other times, as by record of this court appears, prayed and petitioned for by this respondent; and also now and at all times reserving her right to legal relief against said refusal, and also now and at all times reserving her rights under and to the various pleas and exceptions hereinbefore by her plead to, and against the original and supplemental petitions
216 of plaintiffs and intervenors herein, and only now further appearing herein under order of this court, ordering defendant to answer herein now to the said original and supplemental petitions and interventions herein filed against her, denies all and singular the allegations therein contained except as may be hereinafter specially admitted.

Respondent admits the probate of the will of her father, Daniel Clark, made by said Clark, and dated the 13th July, 1813, and she specially denies that the evidence and testimony of the witnesses upon which said will was admitted to probate was either false, erroneous, illegal, or insufficient.

And respondent further specially denies that the parties, plaintiffs and intervenors, or any of them, allege any right of action to contest the validity of the said decree of probate, or to seek the revoca-
217 tion of said will of Daniel Clark of the 13th July, 1813, or the recalling of the said decree of probate, and the same has acquired and hath the force of the thing adjudged.

And respondent further specially pleads against the action of plaintiffs & intervenors, and in bar thereof the prescription of one, three, five, & ten years.

Wherefore respondent prays that the petitions of said plaintiffs and intervenors be dismissed with costs.

(Signed) FELLOWS & MILLS.
RACE, FOSTER & E. T. MERRICK.

Intervention of W. A. Elmore & al.—Filed May 22d, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

To the honorable the judge of the second district court for the parish of Orleans:

218 The petition of intervention of Wm. A. Elmore, in his own right and as tutor to his minor children, Florence, Franklin, Henry, & Minor M. Elmore; P. T. Minor, Fanny Montgomery, aided by her husband, Edwd. Montgomery, Wm. W. Minor, & Mrs. Myra F. Minor,

all residing in the city of New Orleans, and Adolphe Sigur, tutor to Achille Sigur, residing in the parish of Iberville, and Henry D. Minor, for himself and as tutor to the minor children of John L. Minor, & Miss L. D. Minor, both being dead, to wit, George, John, & Sidney Minor, filed after he had & obtained from this honorable court, with respect represents: That Mrs. Myra Clark Gaines, a citizen of the State of New York, but now residing in New Orleans, made application to this honorable court on the 18th of January, 1855, for the probate of an alleged last will of Daniel Clark, dated July 13th, 1813, and upon hearing did obtain, before the supreme court of this State, an order by
219 which said pretended last will, as set forth in her petition, then filed, & was recognized as the last will and testament of said deceased Daniel Clark, and was ordered to be recorded and executed; which facts, with other necessary details, will appear from the record of the succession of the said deceased Daniel Clark, No. , on the docket of this court.

Now petitioners aver that they are interested in setting aside, and annull*ed* the said alleged will of July 13th, 1813, and the probate thereof, said Mrs. Myra Clark Gaines having filed a bill in chancery some time in the year 1866 against Florence A. Brown and your petitioners, in the circuit court of the U. S., fifth circuit & district of Louisiana, and numbered on the docket of said court 4010, which suit is now pending, in which the said Mrs. Gaines claims of your petitioners a cer-
220 tain portion of ground situated in the parish of Ascencion, containing about 700 acres, more or less, a portion of which once belonged to petitioners.

Petitioners show that they are desirous of joining the plaintiffs in the present suit, and for that purpose they file this intervention, adopt and make their own all the allegations contained in plaintiffs' original petition, filed May 27th, 1869, and their supplemental petition filed 11th Feb'y, 1871, in this case, so far as the allegations in said petitions contained are applicable to petitioners' case.

Petitioners further show that the value of the interest of each of your petitioners, in the property claimed by Mrs. Gaines, in her suit in the U. S. circuit court, 5th circuit, dist. of La., exceeds in value the sum of ($500) five hundred dollars.

Wherefore your petitioner prays that the said Myra Clark
221 Gaines may be cited to answer *to answer* this petition, and, after legal process had, judgment may be rendered against her, revoking the said pretended will of July 13th, 1813, and recalling the said decree of probate thereof as absolutely void and of no effect in law.

And your petitioners pray for all other relief and remedy the nature of the case may require, and that may pertain to law & equity.

(Signed) W. A. ELMORE,
Atty. for Pet'rs & pro. pers.

Order.

Let this intervention be filed.
New Orleans, May 22d, 1871.
(Signed) T. WHARTON COLLENS, *Judge.*

Citation.

State of Louisiana, second district court for the parish of Orleans.

222 Jos. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES. }

To Mrs. Myra C. Gaines, of N. O.:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court for the parish of Orleans in ten days after the service hereof.

Witness the Hon. T. W. Collens, judge of the said court, the 23d day of May, in the year of our Lord 1871.

(Signed) M. O. TRACY, *Clerk.*

Sheriff's return on citation.

Received on the 23rd day of May, 1871, and on the 25th day of same month and year served a true copy of the within citation & ac-
223 companying petition on Mrs. Myra C. Gaines, defendant herein, in person.

Returned same day.

(Signed) F. PFISTER, *D'y Sh'ff.*

Note of evidence taken in open court & filed May 27th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES. }

Counsel for plffs. offered in evidence:

1°. Testimony of François Dussau Delacroix, taken September 18th, 1835, and contained in N. O. R., vol. 2, pages, 767, 768, 770, & 771.

It is admitted that François Dussau Delacroix is dead.

Counsel for plaintiffs further offered in evidence:

2°. Testimony of F. Dussau Delacroix, taken June 11th, 1848, to be found in record No. 122, Myra Clark Gaines vs. Richard Relf, Beverly Chew, & als., United States circuit court, at pages 534 to 539, inclusive.

224 3°. The answer of Dussau Delacroix made in suit of Myra Clark Gaines vs. T. D. Delacroix, United circuit court, No. 2619, to be found in vol. 1 of printed record of said suit, on pages 13 to 53, inclusive; also, the stipulations as to said answer, & the affidavit of Delacroix thereto, on pages 52 & 53 of said volume.

4°. The answers of Richard Relf and Beverly Chew, filed 14th January, 1845, in suit Myra Clark Gaines vs. Relf, Chew & als., No. 122 of United circuit court, pages 39 to 65, inclusive, in volume 2 of the printed record of suit of Myra Clark Gaines vs. City of New Orleans.

5°. And in connection with the foregoing answers of Relf, the bill of the complainant, filed in said suit No. 122, on the 16th August, 1836, as found in volume 2, N. O. R., pages 1 to 25, inclusive; and the amended bill filed July 2d, 1844, in said suit, found in same volume on

225 pages 25 to 27, inclusive; and the decree of the Supreme Court, upon the demurrer of Relf, rendered in 1844, & reported in Second Howard Report, 646.

It is admitted that Richard Relf died on the 26th day of October, 1857.

Order.—Case continued as entered in the minutes of May 27th, '71.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding:

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

This case came up this day regularly for trial—M. Taylor & J. McConnell, for plff.; Dirrhammer & Kennard & J. D. Hill, for int.; Race, Foster & E. T. Merrick, & Fellows & Mills, for deft.

When, after hearing part of the evidence, the matter is continued to Saturday June 3rd, 1871, at 11 o'clock a. m., for further trial.

226 *Plea of res judicata as to status.—Filed June 3rd*, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

And now Myra Clark Gaines, through the undersigned, her counsel, while reserving all and singular her rights under the pleas and exceptions and answer hereinbefore filed by her, and now only because this honorable court has allowed to be introduced in evidence certain evidence on part of plaintiffs and intervenors, for the purpose of establishing that said Myra Clark Gaines, defendant, is not the legitimate daughter of Daniel Clark, her father, and for the purpose of establishing that the said Myra is the adulterous bastard child of said Daniel Clark, as set forth in the original and supplemental petitions of said plaintiffs
227 and intervenors, said defendant pleads this her plea of res judicata and peremptory exception to said issue of the status of said defendant, and to the issue raised by said petitions that she, the said defendant, is not the legitimate child and heir of said Daniel Clark; and now respondent alleges that said issue of fact and of law has been finally and irrevocably determined and adjudged in her favor by the Supreme Court of the United States in the cases entitled "Myra Clark Gaines, complainant and appellant, vs. Duncan N. Hennen," No. 221 of the docket of said Supreme Court, and which decree was rendered at the December term of 1860 of said Supreme Court; and of "Myra Clark Gaines, appellant, vs. the City of New Orleans & al.," No. 82 of the docket of said court; of "Myra Clark Gaines vs. F. D. Delacroix
228 & al.," No. 81 of the docket of said court; and of "Myra Clark Gaines vs. Manuel J. Lizardi & al.," No. 83 of the docket of said court, and in which said last three cases the decree of said Supreme Court were rendered at the December term, 1867, and by decree of the U. S. circuit court for the district of Louisiana, rendered in pursuance of the said decrees of the Supreme Court, at its April term, 1870, all of

which will more fully appear by certified copies of said decrees, and by which decrees and judgments Myra Clark Gaines was adjudged and decreed to be the only legitimate child of Daniel Clark, and as such was exclusively invested with the character of such legitimate child and entitled to all the rights of the same. And that your respondent is entitled to legal affiliation as the child of Daniel Clark and Maria Julia Carrierè, begotten in lawful wedlock.

229 Wherefore respondent to said issue as to the status of respondent as the legitimate daughter and heir of said Daniel Clark and begotten in lawful wedlock with defendant's mother, Maria Julia Carrierè, pleads the said final decrees of the Supreme Court of the United States and of said United States circuit court for the district of Louisiana as res judicata and binding and irrevocable against plaintiffs and intervenors herein, and prays judgment in favor of respondent on this her plea.

(Signed) FELLOWS & MILLS,
RACE, FOSTER & E. T. MERRICK,
Attorneys.

Note of evidence taken in open court & filed June 3rd, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

230 It is agreed that the same evidence offered and to be offered on behalf of the plaintiffs shall be considered as having been offered on behalf of the intervenors also, subject to the same bill of exceptions as taken by the plaintiff or defendant.

Counsel for defendant offered in evidence:

6°. The original demurrers of Relf & Chew, filed in the year 1841, in the said suit No. 122, as found in printed New Orleans Record, vol. 1, page 344, together with the decision of the United States Supreme Court thereon; in printed New Orleans Record, vol. 1, page 358; together with the opinion of the Supreme Court of the United States, in 2d Howard's Report referred to in said decree & made part thereof.

7°. Letter of Richard Relf, dated May 13th, 1857, addressed to Mrs. Myra C. Gaines, as found in the New Orleans printed record,

231 vol. 1, page 187, the same having been offered in evidence by the complainant herself in said suit.

8°. Depositions of Daniel W. Cox, taken 25th August, 1849, & the exhibits, letters, & documents thereto annexed, together with the interrogatories & cross-interrogatories & commissions taken in the suit of E. P. Gaines & wife vs. Chew, Relf & others, No. 122 of the United circuit court, as found in the printed New Orleans Record, vol. 2, page 404 to 494 inclusive; said testimony having been offered and received in evidence in the 3 suits of the said Myra C. Gaines against various defendants in the United circuit court, to wit, Nos. 2734, 2695, 2619 & 122, and in connection with said depositions & documents thereto annexed—

Counsel for plaintiffs offers:

The testimony of G. B. Duncan, taken in the said suits above numbered, and as found in the printed New Orleans Record, vol. 1,

232 page 871 to 874 inclusive.

It is admitted that Mr. G. B. Duncan is dead.

Counsel for plaintiffs further offered in evidence:

9°. To contradict the testimony of witness Bellechasse.

Letter from Bellechasse to D. W. Cox, dated Dec. 10th, 1819, as found in the New Orleans printed record, vol. 1, pages 854 & 856; also, deposition of G. W. Cope and G. B. Duncan, & the admission of the genuine'ss of said letter as found in the printed New Orleans Record, vol. 1, pages 856–867; also, the letter of D. W. Cox to Bellechasse, dated Nov. 24th, 1819, to which the above is the answer, as found in the printed record No. 122, page 520, 521.

Also, for the same purpose:

The letter of Bellechasse, dated Havana, Oct. 9th, 1814; another letter of the same date, & a third letter dated from jurisdiction de Matanzas, 31st January, 1815—and the fourth from same place dated October 23rd, 1822, all of said letters as found in the printed New Orleans record, vol. 2, pages 1074 to 1079 inclusive.

10°. To prove the above letter counsel for plaintiffs offers—

The deposition of Theo. Zacharie taken in suit 122, of Gaines vs. Chew, Relf, & others as found in the printed New Orleans record vol. 2, pages 374 & 376 inclusive.

11°. Record of suit for alimony, brought by Samuel P. Davis as curator ad litem for Myra Clark, on the 24th June, 1817, as found in printed New Orleans record, vol. 2, page 551 to 554 inclusive.

Said record is offered to contradict the testimony of S. B. Davis.

12°. To contradict and impeach the testimony of S. B. Davis & Mrs. Smythe, counsel for plaintiffs offers—

The testimony of Peter A. Brown, as found in printed New Orleans Record, vol. 1, pages 892 to 898 inclusive.

13°. Act of sale from Daniel Clark to J. D. D. Bellechasse, dated May 16th, 1811, as found in printed New Orleans Record, vol. 2, page 1048 to 1049 inclusive.

14°. Copy of act of sale J. D. D. Bellechasse to Myra Clark, dated April 9th, 1833, as found in the printed New Orleans Record, vol. 2, pages 545 & 546 inclusive.

15°. Copy of act of sale F. D. Delacroix to Myra Clark, through S. B. Davis her curator ad bona, dated May 16th, 1820, as found in the New Orleans printed record, vol. 2, pages 1049 & 1050, original of said acts found on pages 542 to 543 of said volume, there being an error in the printed translation as to date.

16°. Marriage certificate of Jerome Desgrange & Maria Julia Carrière (the defendant's mother) in this city, in the year 1794, as found in the printed record No. 122, pages 748 to 751 inclusive, and translation thereof in printed New Orleans Record, vol. 2, page 1058 to 1059 inclusive.

17° Rejected by the court.

18°. The will of Mary Clark, as found in the printed probate record, pages 73 to 75 inclusive.

19°. Petition filed 18th June, 1834, in this court by the defendant herein, to prove her admission of the fact that Mary Clark, mother of Daniel Clark, had accepted the succession of Daniel Clark, and that she and her heirs with the heirs of the said Mary Clark had been put in possession of the succession of Daniel Clark & the property thereof, as heirs of Daniel Clark, said petition to be found in New Orleans printed record, vol. 2, page 708 to 710 inclusive.

20°. Letter of Daniel Clark to his sister, dated October 14th, 1805, as found in printed New Orleans record, vol. 2, page 527.

21°. Testimony of H. Davis as found in printed New Orleans
236 Record, vol. 2, pages 381 to 386 inclusive, together with the documents therein made exhibits & referred to.

22°. Stipulation as to the genuine'ss of the letter of Daniel Clark, dated New Orleans, October 14th, 1805, to his sister, as found in printed New Orleans record, vol. 2, page 386.

23°. Testimony of Dr. Barnes, as found in New Orleans printed record, vol. 2, page 526 to 529 inclusive, and testimony of Seth Barton, in printed New Orleans Record, vol. 2, page 951 to 955 inclusive.

(Nos. 20°, 21°, 22°, & 23° are offered together.)

24°. Letter of D. Clark to D. W. Cox, dated 29th June, 1812, as found in printed New Orleans Record, vol. 2, page 594 to 598 inclusive.

25°. Letters of D. Clark to D. W. Cox, dated 12th January, 1808, 9th Feb'y, 1808, 14th Feb'y, 1808, as found in printed New Orleans Record, page 939 & 940 inclusive.

237. 26°. The ecclesiastic record & translation thereof as found in New Orleans printed record, vol. 2, pages 497 to 518 inclusive.

27° Testimony of J. Bermudez, in printed New Orleans Record, vol. 1, page 880 & 891 inclusive, & in vol. 2, page 496.

28° Testimony of Rev'd Antoine Blanc, archbishop, in printed New Orleans Record, vol. 1, pages 195, 198 inclusive, & in vol. 2, page 494 & 495 inclusive.

29°. Testimony of H. T. Caire & H. B. Eggleston in printed New Orleans Record, vol. 2, page 495 & 496 inclusive.

30°. Testimony of Isidore A. Quimper, in New Orleans printed Record, vol. 2, pages 390 & 391 inclusive.

31°. Testimony of A. Cruzat, in printed New Orleans Record, vol. 2, page 496.

32°. Testimony of Z. Cavalier, in printed New Orleans Record, volume 2, pages 367 & 374 inclusive.

238 33°. Testimony of E. Caraby in printed New Orleans Record, vol. 2, pages 376, 378 inclusive.

34°. Testimony of P. J. Tricou, same record, vol. 2, pages 379, 380 inclusive.

35°. Testimony of Horatio Davis, in same record, vol. 2, pages 381 386, inclusive.

36°. Testimony of W. W. Montgomery, in same record, vol. 2, pages 391 to 395 inclusive.

37°. Testimony of J. Courcelles, same record & volume, pages 397, 399 inclusive.

38°. (Rejected by the court.)

39°. Testimony of Jean B. Dejean, sr., same record & volume, pages 400 & 401.

40°. Testimony of H. J. Domingo, same record & volume, pages 401, 402 inclusive.

41°. Testimony of Chas. Harrod, same record & volume, pages 402, 403, inclusive.

42°. Testimony of Robin de Bellevue, same record & volume, pages 362 & 365 inclusive.

239 43°. (Rejected by the court.)

44°. (Rejected by the court.)

45°. (Rejected by the court.)

46°. (Rejected by the court.)

47°. Record of suit of Zulime C. Desgrange vs. Jerome Desgrange, brought Nov. 30th, 1805, for alimony, as found in New Orleans printed record, vol. 2, pages 554, 556, inclusive.

48°. Record of suit of Zulime C. Desgrange vs. Jerome Desgrange, brought June 24th, 1806, for divorce as found in printed New Orleans record, vol. 2, page' 557 & 560 inclusive.

The following portion' of the evidence offered above under No. 8°, are rejected by the court: 1°. Letter of Mr. Mazureau, as improperly annexed & not called for, the interrogatories & the cross-interrogatories. 2°. Letter of P. Alexander rejected as irrelevent & not called . 3°. Bill of sale from Chew & Relf to Cox, & agreement at pages 435 & 436, which are rejected for the same reasons.

240 *Order: Case continued, as entered in the minutes of June 3rd, 1871.*

JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

Second dist. court for the parish of Orleans. Hon. T. W. Collens presiding in place of Judge L's Duvigneaud, recused: .

This case came up this day regularly for further trial—Miles Taylor & J. McConnell for plffs.; Dirrhammer & Kennard & J. D. Hill for int.; Race, Foster & E. T. Merrick, Fellows & Mills, for deft—when, a plea of resjudicata as to status being presented on behalf of defendant, the court orders the same to be filed & tried with the merits of the case.

And, after hearing further evidence, the matter is continued until Saturday next, the 10th instant, at eleven o'clock a. m.

241 *Petition of defendant for removal of cause.—Filed June 9th, 1871.*

JOS. FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

And, now into court, by the undersigned, her counsel, comes Myra Clark Gaines, and as to the petition of intervention of Wm. A. Elmore, in his own right and as tutor, &c., and others allowed by the honorable T. Wharton Collens, judge, on the 22d May, 1871, in the above entitled and numbered cause, and before further answering or appearing herein as respondent in said intervention, and by this her petition for removal of said cause in intervention, alleges:

That this defendant is a citizen of the State of New York, and was so at the institution of said suit, and the filing of said petition of
242 intervention by said Elmore & als., and that said Elmore and others, plaintiffs in said intervention, as also all and singular the plaintiffs who originally instituted said suit, at the time of the institution of said suit, and also at the time of the filing of said petition in intervention, were, and still are, citizens of the State of Louisiana.

That the matter in dispute in said suit, and in the suit of said Elmore & als., intervenors, and in each thereof, exceeds the sum of five hundred dollars, exclusive of costs.

And defendant in said suit, and petitioner herein for renewal of said cause, further alleges that, from prejudice and local influence, she has reason to believe, and does believe, that she will not be able to obtain justice in this honorable court, in the matters and issues raised and involved in this suit, and in the said intervention of Elmore & als.
243 That this suit has not yet been tried, and that this defendant

and petitioner herein for removal desires to remove this suit, and the suit in intervention of said Elmore & als., intervenors, into the next circuit court of the United States, to be held in the district of Louisiana, in the fifth circuit, in pursuance of the laws of the United States in such cases made and provided, and specially of the twelfth section of the act of Congress entitled "An act to establish the judicial courts of the United States," approved September 24th, 1789, and the act entitled "An act to amend an act entitled 'An act for the removal of causes in certain cases from State courts,'" approved July 27th, 1844, which said amendatory act was approved March 2d, 1847.

And now that said defendant in said suit and petitioner for
244 said removal alleges that she is ready and willing to give such good and sufficient security as may be required for her doing all acts and things required to be done by said provisions of law upon the removal of a suit into the United States court, and she offers herewith her bond, executed by herself as principal, and , of the city of New Orleans, as surety, in the sufficient sum of five hundred dollars, conditioned that she, your present petitioner, shall enter, in the next circuit court of the United States to be held in the said district of Louisiana, in the fifth circuit, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in this suit, and doing such other appropriate acts as by the said acts of Congress are required to be done upon the removal of a suit into
245 the United States circuit court, as good and sufficient security according to the said provisions of law upon the removal of a suit into the United States court.

And your petitioner herein therefore prays that the said bond be accepted as good and sufficient security according to the said provisions of law, and that the said suit, as well of original plaintiffs as of said Elmore & als., intervenors, may be removed into the next circuit court of the United States to be held in district of Louisiana, in the fifth circuit, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had therein in this court; for all orders required in the premises.

(Signed) MYRA CLARK GAINES.

Myra Clark Gaines, the petitioner in the foregoing petition,
246 being duly sworn, deposes and says that she has read the said petition and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

And this deponent further says that she has to believe, and does believe, that from prejudice and local influence she will not be able to obtain justice in this court.

(Signed) MYRA CLARK GAINES.

Sworn and subscribed before me this 9th of June, 1871.

(Signed) W. L. EVANS,
Second Justice Peace, Parish of Orleans.

Bond for removal.—Filed June 9th, 1871.

JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA CLARK GAINES. }

Second district court for the parish of Orleans.

247 Know all men by these presents that we, Myra Clark Gaines,

as principal, and Wm. Reed Mills, as surety, are held and firmly bound unto Wm. A. Elmore & als., plaintiffs in intervention in the above numbered and entitled cause, and whose names are fully set forth in the petition of intervention filed herein on the 22d May, 1871, and to all parties plaintiffs and intervenors in said suit, in the sum of five hundred dollars, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this ninth day of June, 1871.

Whereas the above-bounden Myra Clark Gaines has this day filed a petition for the removal of this said cause, and specially the cause and action of W. A. Elmore, for self & tutor, and others, as plaintiffs in intervention, against her, the said Myra Clark Gaines, from
248 this honorable court to the next circuit court of the United States for the fifth circuit and district of Louisiana, and in her petition for removal specially set forth: Now, therefore, the condition of the above obligation is such, that if the above-bounden Myra Clark Gaines or her legal representatives shall enter or cause to be entered in the circuit court of the United States for the district of Louisiana, on the first day of its stated session next ensuing after the order of said second district court for the parish of Orleans for the removal of said suit into said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and specially those appertaining to the action of intervention of said Wm. A. Elmore, for self & tutor and others, intervenors by petition of interven-
249 tion filed herein on the 22d May, 1871, and do or cause to be done such other appropriate acts as by the said acts of Congress, approved 24th September, 1789, & M'ch 2d, 1847, und' which said acts said removal has been by said Myra Clark Gaines prayed for, as required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) MYRA CLARK GAINES.
WM. REED MILLS.

STATE OF LOUISIANA,
Parish of Orleans:

Wm. Reed Mills, the surety in the foregoing obligation named, being duly sworn, deposes & says, that he is a resident of the State of Louisiana, and owes real and personal property therein, and is worth over the sum of five hundred dollars over all his just debts and liabilities,
250 and exclusive of property exempt by law from execution.

(Signed) WM. REED MILLS.

Subscribed and sworn before me this 9th June, 1871.

(Signed) W. L. EVANS,
Second Justice Peace, Parish of Orleans.

Order rendered on petition to remove intervention of Elmore & als.

This is only a renewal of similar petitions previously filed & refused by this court & by the circuit court of the United States in this circuit.

It is, therefore, for the same reasons given on the first instance, also refused.

New Orleans, June 9th, 1871.

(Signed) T. WHARTON COLLENS, *Judge.*

Order.—Case continued, as entered in the minutes of June 17th, '71.

Second district court for the parish of Orleans.

251 JOS. FUENTES & AL. *vs.* MYRA CLARK GAINES. } No. 32979.

Hon. T. W. Collens presiding in place of Judge Duvigneaud, recused.

This case came up this day by consent, all parties being represented in open court; when, after hearing counsel upon the objections to the evidence offered on former trial, the matter is continued to Saturday next, the 24th instant, at 12 o'clock m.

Note of evidence taken in open court & filed June 24th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

In reference to piece of evidence No. 23:

252 J. MCCONNELL, sworn on behalf of plaintiffs, says:

I do not know that Dr. Barnes, the witness whose testimony has been offered by plaintiff, is dead; but I have no knowledge of his place of residence, other than that, many years ago, he was at one time in Philadelphia, & at another time in St. Louis. To my knowledge he never resided in the State of Louisiana.

I have offered reward to the clerk of this court to find either the trunk mentioned in the testimony of Dr. Barnes, or any of the old papers, letters, & records connected with the succession of Daniel Clark, which appeared to be missing from the probate court. For instance, particularly the record-book containing the records of all the proceedings had in the succession of Daniel Clark, being vol. 6. For the recovery of this book I remember having offered as much as $50.00
253 in gold. I made diligent search myself, & have been unable to have any of the letters, documents, & books referred to as being missing.

X-examination:

Question. How many years ago was Dr. Barnes in Philadelphia, as stated by you in your statement in-chief?

Answer. I never knew that he was in either place. I derived my impression of his being there by reading his deposition in these cases and from what I have heard within the 18 years. G. B. Duncan was associated with me 18 years in these cases.

Question. In which of the Gaines cases where you first retained as counsel in the United circuit court, whether of record or otherwise?

Answer. Mr. G. B. Duncan associated me with him as counsel in the Gaines cases on my admission to the bar in 1852. The suit then
254 pending in the United circuit court was that of Relf & Chew then on appeal before the Supreme Court of the United States. The suits in the circuit court, upon the defeat of Mrs. Gaines in that

case, were instituted in 1857. My association with him in the suit then pending before the Supreme Court of the United States was informal. My regular association as counsel of record in these cases dated from the institution of the suit for the probate of the will in this court in Jan'y, 1855.

Question. I understand you were first retained in the Gaines-Relf cases in 1852. Is it so?

Answer. I have already stated that I considered myself as informally associated with Mr. Duncan in these cases on my admission to the bar in 1852, simply for the reasons that when Mr. Duncan went on to
255 Washington City to argue that case in 1852 he left me in the entire charge of his business, and shortly after his return*ed* associated me in full partnership with him.

Question. I understand you to state that you attended to the case to probate the will in this case in January, 1855.

Answers. I came to this court with Mr. Duncan as counsel for Mr. Relf & Dussau Delacroix, for the purpose of contesting the probate of the will, and we were no' allowed to do so, the court ruling that the examination was ex parte, as appears of record in this case; that the examination concluded nobody; which ruling was upon an exception filed by counsel for Mrs. Gaines, as appears of record.

Question. Did you either aid in the argument or in the preparation of the brief filed before the Supreme Court in 1855, on the part of Mr. Relf?

256 Objection being made by counsel for plaintiffs upon the grounds of irrelevancy:

The court sustained the objection & overruled the question as wholly irrelevant to anything that ha*ve* been said in the statement-in-chief, and wholly irrelevant to the present point of inquiry.

Counsel for defendant states that he desires to go on and cross-examine the witness generally on the matters at issue in this case.

Whereupon the court overruled the question as wholly irrelevant as to any matter at issue in this case, and requires the counsel, before permitting an answer to the above question, to state what bearing any answer to that question could have.

A. J. VILLERÉ, sworn on behalf of plaintiffs, says:

257 Examination-in-chief:

At the request of Mr. J. McConnell, counsel for plaintiffs in this case, I have made searches for a trunk said to contain papers of Daniel Clark, deceased. I have searched the office thoroughly, and no such trunk was found to be in said office; if the trunk had been in the office I would have found it. Mr. McConnell also requested me to look for and to search for any papers, books, documents, and letters connected with the succession of Daniel Clark, which might have been deposited in the old probate court.

The only papers that I have found is the record of the succession of Daniel Clark, opened about the year 1813. That record has not been examined by me with the view of ascertaining whether it was a complete record. That record consisted of a bundle of papers. I
258 have also found in the vault of the court the original will of 1811, the proces-verbal of probate thereof, and the proces-verbal of the affixing of the seals. I found nothing else.

On being shown one of the papers in the record of the succession of Daniel Clark, being a petition to obtain an authorization for certain purposes, filed Aug. 27th, 1813, and endorsed at the bottom "Recorded fol.

299th, vol 6," is asked whether that book, vol. 6, was found in the office, and whether Mr. McConnell had not requested him to search for it; witness says: The book is not in the office. Mr. McConnell had requested me to search for it, and I did search for it. I am the manager of the office of the clerk of this court since 1865 up to the present time.

X-examination:

For the first time, Mr. McConnell requested me to make the
259 searches above referred to shortly after the institution of this suit. He afterwards renewed his request two or three times, at intervals.

It is admitted that Mr. Seth Barton is dead.

It is admitted that Mr. Horatio Davis is dead.

49°. The testimony of Horatio Davis, Seth Barton, Dr. Barnes, J. McConnell, & A. J. Villeré, are offered to prove the letter of Daniel Clark, dated 14th October, 1805, and its lost.

Counsel for plaintiffs now offered in evidence:

50°. The testimony of Horatio Davis generally, as found in printed New Orleans Record, vol. 2, page 381 to 386 inclusive, together with the documents therein, made exhibits and referred to, taken before J. W. Gurly, commissioner, in suit No. 122 of the United circuit court.

The said testimony appearing in the printed record of said
260 suit, No. 122, at pages 566 to 571 inclusive.

It is now ordered by the court that the piece of evidence under No. 26, being the ecclesiastic record & translation thereof, as found in New Orleans printed record, vol. 2, pages 479 to 518 inclusive, be received, not as a valid or conclusive proceedings or judgment taking effect as if the ecclesiastic court had jurisdiction, but as an ancient document showing contemporaneous facts bearing upon the marital status of Zulime Carrière & to show the antiquity of the documents and declarations contained in the record.

Counsel for John & Jas. C. Davidson, intervenors, offered in evidence copy of act of sale of property by City of Baltimore to Jno. & Jas. C. Davidson, marked G. B.

261 A. J. Villeré, recalled, stated on behalf of plaintiffs, the original letter of Daniel Clark, dated 14th October, 1805, reported in the New Orleans printed record, vol. 2, p. 527, is not to be found in the record of the succession of Daniel Clark, now in the court-room of the second district court, nor is any copy of said letter to be found in said record.

DOCUMENT G. B.

Being act of sale of property by City of Baltimore to John & Jas. C. Davidson, offered in evidence on behalf of said J. & J. C. Davidson, intervenors, and filed June 24th, 1871.

STATE OF LOUISIANA,
City of New Orleans:

Be it known, that this day before me, Edward G. Gottschalk, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in presence of the witness hereinafter named and undersigned, personally came & appeared
262 Brantz Mayer and William S. Peterkin, of the city of Baltimore, State of Maryland, and Thomas L. Emory of the city of New Orleans aforesaid, herein acting as the agents of the said City of Baltimore, duly and specially appointed in & by the first section of an ordinance

enacted and ordained by the mayor and city council of Baltimore, and entitled "An ordinance for the appointment of agents to represent the city of Baltimore in the receipt, administration, sale, and liquidation of Baltimores' interest in the estate of the late John McDonough, of Louisiana, deceased, and for the appointment of a board of trustees of the McDonough Educational Fund and Institute," approved on the 28th day of May, 1858; an authentic copy of which said ordinance is annexed to an act of deposite, passed in the office of H. B. Cenas, notary
263 public in this city, on the 25th day of January, 1859.

Which said appearers declared that whereas the said late John McDonough died in this parish on the 26th October, 1850, having previously, by his olographic last will and testament, written, dated, & signed on the 29th December, 1838, in the town of McDonough, in this State, bequeathed in equal undivided moieties to the corporation of the city of New Orleans aforesaid, and the city of Baltimore aforesaid, all his real and personal estate, movable and immoveable property, with the exception of a few special legacies;

And whereas the said testament was proved, registered, & duly homologated by a decree rendered on the 28th October, 1850, by the honorable A. M. Buchanan, judge of the fifth district court of New
264 Orleans, and the said cities were placed in possession of the estate of the said deceased, as will appear by reference to the proceedings in the matter of the "succession of John McDonough," No. 4112 of the docket of said court;

And whereas, subsequently to the case of "The City of New Orleans vs. The City of Baltimore, American Colonization Society, and Society for the Relief of Destitute Orphan Boys of New Orleans," No. 11578 of the docket of the said fifth district court of New Orleans, the said city of New Orleans prayed for a partition in kind of the estate of the said deceased, and thereupon a decree was rendered on the 26th June, 1857, and signed on the 3rd July, 1857, by the honorable H. B. Eggleston, judge of the said court, making the partition prayed for; which
265 decree was confirmed by a decision of the supreme court of the State of Louisiana, rendered on the 8th March, 1858;

And whereas, under & by virtue of the decree aforesaid, and the partition of the said estate then made, the property hereinafter described and conveyed accrued to the said city of Baltimore;

And whereas by the third paragraph of the second section of the ordinance above referred to they, the said appearers, are directed and empowered, among other things, "to advertise for sale, and to sell a public auction, if advisable, and if not deemed by them advisable, then to sell at private sale, at the earliest favorable period, and on such terms as to credit and purchase-money as in their judgment shall be most advantageous for the interest of the city of Baltimore, all and
266 every part of the real and personal estate, moveable & immoveable property, belonging to said city of Baltimore, under and by virtue of will of the said John McDonough, and of the decree of partition aforesaid.

And the said appearers further declared that by virtue of the powers and authority thus vested in them they caused a portion of the real estate which accrued to the said city of Baltimore, as aforesaid, to be sold at public auction in this city, by Norbert Vignié, a duly licensed auctioneer, on the 17th day of March, 1859, after due advertisement of the time and place of sale, on the following terms and conditions, to wit: one-fifth of the price in cash, and the balance on a credit of one, two, three, and four years, the purchaser or purchasers to furnish notes for the

credit portion of the price of equal amounts, bearing interest at
267 the rate of six per cent. per annum from the day of sale until maturity, and if not then paid, to bear interest thereafter until final payment at the rate of eight per cent. per annum, and to be secured by special mortgage on the property sold.

At which public sale the property hereinafter described was, by the said auctioneer, adjudicated to John & James C. Davidson of this city, the last and highest bidder thereon, for the price and sum of three thousand four hundred and fifty-five dollars, on the terms and conditions aforesaid, all of which will more fully appear by reference to the process-verbal of sale of the said auctioneer, annexed to an act of sale to Wm. Randolph, passed before me, notary, under date hereof.

Now, therefore, in consideration of the premises, and pursuant
268 to the terms and conditions of the public adjudication aforesaid, they, the said appearers, further declared that they do, by these presents, in their aforesaid capacities, and by virtue of the authority in them vested by the above-mentioned ordinance, grant, bargain, sell, convey, transfer, assign, and deliver with all legal warranties, unto said James & J. C. Davidson, present, accepting, and purchasing for themselves, their heirs and assigns, and acknowledging due possession thereof, the following-described property, with all the rights, privileges, customs, servitudes, ways, and appurtenances thereunto belonging, to wit:

1°. Nineteen lots of ground situate in the second district of this city, composing the whole of the square or ilet bounded by Pont, Hagan,
269 Toulouse, & St. Peter streets, designated as lots Nos. one to nineteen inclusive, of square No. forty-seven, on a plan deposited in my office, as plan No. sixteen, to which special reference is hereby made.

2°. Twenty-one lots of ground situate in the same district of this city, in the square bounded by Pont, Hagan, Orleans, and St. Ann streets, designated as lots Nos. one to twenty-one inclusive, of square or ilet No. twenty-nine on the aforesaid plan No. *No.* sixteen. Lot No. one has thirty feet front on St. Ann street, ninety-three feet two inches five lines depth and front on Hagan street, ninety-three feet three inches six lines deep on the other line, and thirty feet in the rear. Lots Nos. two to eleven inclusive have each thirty feet front on Orleans street, by an irregular depth—No. two forming the corner of Orleans and Hagan streets. Lots Nos. twelve to sixteen inclusive have each thirty-
270 four feet six lines front on Port street by an irregular depth. Lot No. seventeen has thirty-four feet five lines front on Port street, by an irregular depth—No. twelve forming the corner of Port and Orleans streets, and lot No. seventeen forming the corner of Port and St. Ann streets; and lots Nos. eighteen to twenty-one inclusive have each thirty feet front on St. Ann street by an irregular depth; the whole as per said plan.

Which lot of ground, together with others, were acquired by said late John McDonough by purchase from the late municipality No. one, of this city, per act passed before Joseph Cuvillier, notary public in this city, on the fifteenth of September, eighteen hundred and forty-eight.

To have and to hold the said property unto said purchasers, their heirs and assigns, forever. And the said vendors, in their said
271 capacities, moreover transfer unto the said purchaser all the rights and actions of warranty to which the said city of Baltimore, as legatee of the said late John McDonough, is or may be entitled against all former owners of the said property, hereby subrogating the said purchaser to the rights and actions to be by them enjoyed and exer-

cised in the same manner as they might have been by the said John McDonough or by the said city of Baltimore.

This sale is made and accepted pursuant to the said public adjudication for and in consideration of the price and sum of three thousand four hundred and fifty-five dollars; one-fifth part of which, say six hundred and ninety-one dollars, has been paid in ready money by the said purchasers, and for the balance they have furnished their four promis-
272 sory-notes for the sum of six hundred and ninety-one dollars each, dated on the seventeenth day of March, 1859, the day of the said adjudication, and made payable at the Citizens' Bank of Louisiana, in this city, in one, two, three, and four years respectively after date, bearing interest at the rate of six per centum per annum from date until maturity, and, if not then punctually paid, to bear interest thereafter until final payment at the rate of eight per cent. per annum; which notes, after having been paraphed by the undersigned notary, in order to identify them with this act, were delivered with the said ready money to the said vendors, who hereby acknowledge receipt thereof in their capacities aforesaid.

And in order to secure the punctual payment of the said notes
273 at maturity, and of all interest which may accrue thereon, the said purchasers hereby specially mortgage and hypothecate the said property in favor of the said city of Baltimore, and to enure to the use and benefit of all future holders of said notes, promising and binding themselves not to sell, alienate, or encumber the said property to the prejudice of this mortgage; and as further security for the payment of said notes the buildings on the premises are to be kept fully insured by the purchasers against the risks of fire for their full value, and the policies of insurance to be transferred annually to the agents of the said city of Baltimore until the final payment of the notes. And in case of any delay or neglect on the part of said purchasers in complying with this condition, said policies of insurance may be renewed by the said agents for account of said purchasers.

274 By reference to a certificate from the recorder of mortgages for this parish, annexed to said act of Wm. Randolph, it will appear that the property herein described and conveyed is free from encumbrance, and there are no taxes due thereon according to the proper receipts exhibited to me, notary, as required by law.

Thus done and passed in my office, in the city of New Orleans, in the presence of Selim Magner and Forester Brugier, witnesses of lawful age, and domiciliated in said city, who hereunto subscribe their names, together with the said appearers and me, the said notary, on this twenty-eight' day of March, in the year of our Lord one thousand eight hundred and fifty-nine.

Original signed:

WM. S. PETERKIN.
BRANTZ MAYER.
275 THOS. L. EMORY.
JOHN DAVIDSON.
JAS. C. DAVIDSON.

S. MAGNER.
F. BRUGIER.

E. G. GOTTSCHALK, *N. P.*

I, James Fahey, a notary public in and for the parish of Orleans and the city of New Orleans, duly commissioned and sworn, by executive authority the official representative during his absence of Edward G. Gott-

schalk, also a notary public in *in* this city, do hereby certify the foregoing to be a true copy of the original act on file in the office of said Gottschalk, notary.

In faith whereof I grant these presents under my signature and the impress of my seal of office, at New Orleans, this twenty-third day of June, 1871.

(Signed) JAS. FAHEY, *Not. Public.*

276 *Order.—Case continued as entered in the minutes of June 24th,* 1871.

JOSEPH FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans. Hon. T. W. Collens presiding in place of Judge L's Duvigneaud, recused.

This case came up this day for further trial, all parties being represented in open court, when, after hearing further evidence, the matter is ordered to be continued to Saturday next, the first day of July, 1871, at 12 o'clock m.

Note of evidence taken in open court & filed July 1st, 1871.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

JOHN L. LEWIS sworn for plaintiffs.

277 Being asked whether the following-named parties are living or dead: A. Cruzat, Zénon Cavalier, Etienne Corraley, P. J. Tricou, W. W. Montgomery, Joachim Courcelles, Mistress Eulalie Watkins, Jean B. Dejean, St. Hilary J. Domingou, Charles Harrod, Babin de Bellevue, Rev'd Antoine Blanc, Judge J. Bermudez, H. B. Eggleston, L. T. Carré, Isidore H. Quimpère—

Witness says that, with the exception of Isidore H. Quimpère, in relation to whom he cannot answer, the others are all dead. Witness knew an old gentleman by the name of Quimpère who was a schoolmaster, but does not know whether the schoolmaster & Isidore H. Quimpère are the same person. The old schoolmaster is dead. Witness is 71½ years; resided in this city since he was 3½ years old.

278 JEROME BAYON sworn for plaintiffs.

Being asked the same question propounded to J. L. Lewis—

Witness answers: They are all dead. Witness also says that Mr. Mazureau, the eminent lawyer, is dead; has been at his funerals; he died several years ago; can't recollect the exact year. Witness will be 62 years of age next January.

Cross-examination:

Mr. Quimpère, the old schoolmaster, died long ago. I do not recollect his given name. I do not know whether the Quimpère whose name figures in the question is dead or not.

A. Cruzat died about 12 or 14 years ago; was residing on Rampart street, in this city. I know Mr. Watkins is dead, but do not know in

what year. Jean B. Dejean, sr., died more than ten years ago.
279 Mr. Courcelles is one of the last who died, about six or seven years ago.

Mr. Domingou died about 14 or 15 years ago.

I have never known Mr. Bellevue. Judge Bermudez died about 4 or 5 years ago.

H. B. Eggleston is dead, but do not know when; think about 2 or 3 years ago. Louis T. Caire died about 14 or 15 years ago.

Counsel for plaintiffs offers the following matter contained in the ec'lesiastical record heretofore offered, to wit, specially the following:

No. 1. The petition of Jerome Degrange, (p. 510, vol. 2, New Orleans Record.)

No. 2. Testimony of Jerome Degrange, (p. 571, same vol. & record.)

No. 3. Deposition of Benquerelle, (p. 511, same vol. & record.)

No. 4. The pet. of J. Degrange, (p. 512, same vol. & record.)

280 No. 5. The testimony of Dona Barbara Jean Belle, (p. 513 & 514, same vol. & record.)

No. 6. The testimony of Maria Julie Carrière, (p. 515, 516, same book.)

No. 7. The testimony of Jeronimo Degrange, (p. 516, 517, same book.)

No. 8. The citations and decrees in said ec'lesiastical record.

Counsel for defendant having objected to the said evidence the said evidence was received by the court, not as part of a valid or conclusive proceeding or judgment, taking effect as if the ec'lesiastical court had jurisdiction, but as ancient documents showing contemporaneous facts bearing upon the marital status of Zulime Carriere & Desgrange. The testimony of Quimpère is excluded until proof of his death be given.

The testimony of A. Cruzat, No. 31, is admitted, reserving the
281 consideration of the objection as applicable to the effect of the testimony, and to the weight it is entitled to.

With regard to the testimony of P. J. Tricou, on objection by counsel for defendant to 2d question & answer thereto, are ruled out as inadmissible, and the rest of the testimony is received.

The testimony of W. W. Montgomery is offered, exclusive of the letters and exhibits referred to therein, i. *e.*, all that portion beginning at page 393, vol. 2, N. O. Record, & at the question, Were you acquainted with the late Daniel Clark? On objection of counsel for defendant the last question & answer in the examination-in-chief of Joachim Courcelles is stricken out as inadmissible; all other objections are overruled.

282 It is admitted that Chas. Harrod died within the last two years.

No. 48. Counsel for plaintiffs having withdrawn the offer of the testimony under this number, counsel for defendant stated that they had made no objection to the introduction of this testimony; insisted that it was in & objected to the motion to withdraw. Whereupon the court sustained the objection & decided that the testimony was in evidence.

Order: Case continued, as entered in the minutes of July 1st, 1871.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans, Hon. T. W. Collins, presiding.

This case came up this day as per continuance, all parties being

283 represented in open court, when, after further evidence heard his honor the judge states that although he was willing to go on with the trial of this case, it was impossible for him so to do; that his health was very much impaired; that he had obtained from the proper authority a leave of absence of thirty days to go out of the city for the purpose of recuperating his health.

For these reasons it is ordered that this case be continued to Monday, September 11th, 1871, at twelve o'clock m.

Bill of exception.—Filed by defendant July 6th, 1871.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

Be it remembered that on the trial of this cause, this 27th day
284 of May, 1871, counsel of plaintiffs offered in evidence the testimony of François D. Delacroix, of June 11th, 1848, to be found in the record 122, "Myra Clark Gaines vs. Relf & Chew & al.," U. S. circuit court, on pages 534 to 539 inclusive, to the admission of which in evidence defendant's counsel objected on the grounds:

That said testimony is between other party & res inter alias; is irrelevant to the issue involved in this cause, and so far as the same is intended to dispute the status of the defendant Myra Clark Gaines as the legitimate child of said Daniel Clark is inadmissible on the grounds that said issue is not cognizable in this cause; that said issue of status has become a thing adjudged and is res judicata as against the plaintiffs and intervenors in this cause in cases insti-
285 tuted and determined by the Supreme Court of the United States, and wherein the said status of this defendant was made an issue, and by decree of said Supreme Court of the United States, and by decrees of the United States circuit court for the district of Louisiana, rendered in pursuance of said decrees of the Supreme Court of the United States, and specially in the cases entitled Myra Clark Gaines vs. Duncan N. Hennen, "No. 221 of the docket of said court decided by the said Supreme Court at its December term, 1860," and "Myra Clark Gaines vs. The City of New Orleans & al," No. 82 of the docket, and "Myra Clark Gaines vs. F. D. Delacroix & al," No. 81 of the docket, and "Myra Clark Gaines vs. Manuel J. Lizardi & al," No. 83 of the docket, and which three last-mentioned causes were decided at the December term, 1867, of the said Supreme Court of the United
286 States, copies of which decrees and judgments and the said decree of the said United States circuit court rendered in obedience to the said decree and mandates of said Supreme Court, in said suit No. 82, are hereto annexed and made part of this bill for greater certainty; and further, because plaintiffs & intervenors have not alleged or shown any rights or title under the succession of said Daniel Clark.

Which objections being overruled by the court and said testimony admitted, defendant's counsel excepted to said ruling of the court, and tender this their bill of exception, after exhibiting the same to the opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS,
Judge.

287 *Bill of exception.—Filed by defendant July 6th*, 1871.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

Be it remembered that on Saturday the 27th day of May, 1871, at the opening of the court, the Hon. T. Wharton Collens presiding, this case was called for trial, and thereupon the defendant, by counsel, move' the court to strike out the assignment of the case for trial, and continued the case, on the ground that the court had allowed the intervention of William A. Elmore in his own right, and as tutor to his minor children, which had been filed and served with process of citation upon the defendant; that the delay for praying a removal of the cause and for appearance, exception, or answer, had not expired, and that
288 this defendant was not bound to prepare for trial until the whole case should be at issue, and that the trial of this case at this time would be a surprise, as she had not prepared for the trial of the case, knowing that the intervention had been allowed by the court, and that the delay for excepting or answering had not expired. And therefore the plaintiffs having insisted that the trial should proceed, and the intervenor's counsel, Messrs. Elmore & King, also assenting thereto, the court overruled said motion to strike out the assignment and to continue the cause, made by the defendant, and ordered the trial then and there to proceed, regardless of the intervention; and thereupon the defendant then and there, by counsel, excepted to the said ruling of the court and tendered this her bill of exception for allowance, which is done

289 By the Court:

The court asked Mr. Elmore if he, representing the intervenor, interposed any objection to the trial of the cause being now proceeded with, and whether he wanted a continuance of the case to enable him & the defendant to join issue with the defendant on the intervention; and thereupon, in open court, the said counsel, Mr. Elmore, answered that the intervenors represented by him did not object to the trial of the said cause being proceeded with at that time, and that he did not desire to delay the cause; and thereupon the court ordered the case to be proceeded with as between the parties between whom issue had been joined.

(Signed) T. WHARTON COLLENS, *Judge.*

290 *Bill of exception.—Filed by defendant July 6th*, 1871.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } 32979.

Second district court for the parish of Orleans.

Be it remembered that on trial of this cause the plaintiffs, to maintain the allegations of their petition and amended petition, offered to read in evidence the answer of François Dussau Delacroix, described in plaintiff's petition as filed in the suit of the defendant Myra Clark Gaines against said Delacroix in the circuit court of the United States,

held in the city of New Orleans, and thereupon the defendant, by counsel, objected to the introduction of said answer in evidence in this cause, because the said answer is inadmissible in evidence for the following reason, among others, viz: Because the judgment and decree of
291 the supreme court of the State of Louisiana entered upon the minutes of this hon. court in favor of this defendant has the force of the thing adjudged, and cannot, after this lapse of time, be at-*at*tacked by evidence and the said answer of Delacroix; and all other testimony, and all other evidence sought be introduced under plaintiffs' petition and amended petition, and the intervention on file, is inadmissible to invalidate said judgment of said supreme court; because said answer of said Delacroix forming a part of the pleadings of a cause cannot be offered in evidence without offering the replication, decree, and other portions of the record, and because said answer of said Delacroix having been put at issue by the replication, and having been overcome by the proof, and having been found adversary to by
292 the decree of the Supreme Court of the United States and circuit court of the United States carrying the same into effect, cannot make proof of anything therein contained; because there is no principle of law or morals which made it the duty of the defendant to offer said answer in evidence against herself in this court; because said answer of said Delacroix was filed in a cause and formed part of the pleadings in cause wherein the parties and the issues were different from those in the present suit; because this defendant had no opportunity of cross-examining said Delacroix on the subjects of his said answer, and said Delacroix had no opportunity of explaining said answer as a witness in connection with his previous testimony; because said answer of said Delacroix is res inter alios, irrelevant, and illegal as testimony;
293 and because plaintiffs and intervenors have alleged or shown any interest or title under succession of said Daniel Clark.

But the court being of the opinion that the objections were unfounded in law and in fact, and said testimony was admissible generally, allowed said answer of said Delacroix to said bill of complaint in chancery to be received as evidence in the cause; and thereupon said Myra Clark Gaines, by counsel, excepted and tendered to the court this his bill of exceptions for signature & allowance; which is done.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exception.—Filed by defendant July 6th, 1871.

JOS. FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

294 Be it remembered that on the trial of this cause, this 27th day of May, 1871, counsel for plaintiff offered in evidence the answers of Relf & Chew, of 14th January, 1845, in suit "Myra Clark Gaines vs. Relf & Chew & al.," No. 122 U. S. circuit court, pages 39–65, vol. 2, of the printed record of suit "Myra Clark Gaines vs. City of New Orleans," and the bill of complaint filed in said suit 122 on 16th August, 1836, and amended bill filed July 2d, 1844, found on pages 1–27 in said vol. 2 of printed record 122, and decree of Supreme Court rendered in 1844, reported in Howard Report', page 646, to the admission of which in evidence defendant's counsel objected, on the grounds—

That said testimony is irrelevant to the issue involved in this cause; and so far as the same is intended to dispute the status of the
295 defendant, Myra Clark Gaines, as the legitimate child of said Daniel Clark, the same is inadmissible on the grounds that said issue s not cognizable in this cause; that said issue of status has become a thing adjudged and is res judicata as against the plaintiffs and intervenors in this cause in cases instituted and determined by the Supreme Court of the United States, and wherein the said status of this defendant was made an issue, and by decree of said Supreme Court of the United States, and by decrees of the U. S. circuit court for the district of Louisiana rendered in pursuance of said decrees of the Supreme Court of the United States, and specially in the cases entitled "Myra Clark Gaines vs. Duncan N. Hennen, No. 221 of the docket of said court, decided by the said Supreme Court at its December term, 1860,
296 and "Myra Clark Gaines vs. The City of New Orleans & al.," No. 82 of the docket, and "Myra Clark Gaines vs. F. D. Delacroix & al.," No. 81 of the docket, and "Myra Clark Gaines vs. Manuel J. Lizardi & al.," No. 83 of the docket, and which three last-mentioned causes were decided at the December term, 1867, of the said Supreme Court of the the United States, copies of which decrees and judgments and the said decree of the said United States circuit court, rendered in obedience to the said decree & mandates of said Supreme Court in said suit No. 82, are hereto annexed and made parts of this bill for greater certainty; and further because plaintiffs and intervenors herein alleged or shown any interest or title under the succession of Daniel Clark; which objections being overruled by the court on the grounds orally stated, and said testimony admitted, defendant's counsel excepted to
297 said ruling of the court, and tender this their bill of exception, after exhibiting the same to the opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS,
Judge.

Bill of exceptions.—Fled by defendant July 6th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Be it remembered that on the trial of this cause, this day of 1871, counsel of plaintiffs offered in evidence the record in the suit for alimony brought by Samuel B. Davis, as curator ad litem of Myra Clark, on the 26 June, 1817, as found in New Orleans Record, vol. 2, pp. 551, 554, for the purpose of contradicting the testimony of said Davis, and also generally to the admission of which in evidence defend-
298 ant's counsel objected on the grounds—

That said testimony is irrelevant to the issue involved in this cause, and so far as the same is intended to dispute the status of the defendant, Myra Clark Gaines, as the legitimate child of said Daniel Clark, the same is inadmissible on the grounds that said issue is not cognizable in this cause; that said issue of status has become a thing adjudged, and is res judicata as against the plaintiffs and intervenors in this cause in cases instituted and determined by the Supreme Court of the United States, and wherein the said status of this defendant was made an issue, and by decree of said Supreme Court of the United States and by decrees of the U. S. circuit court for the district of Louisiana,

rendered in pursuance of said decrees of the Supreme Court of the
299 United States, and specially in the cases entitled "Myra Clark Gaines vs. Duncan N. Hennen," No. 221, of the docket of said court, decided by the said Supreme Court at its December term, 1860, and "Myra Clark Gaines vs. The City of New Orleans," No. 82 of the docket, and "Myra Clark Gaines vs. F. D. Delacroix & al.," No. 81 of the docket, and Myra Clark Gaines vs. Manuel J. Lizardi & al., No. 83 of the docket; and which last three mentioned causes were decided at the December term, 1867, of the said Supreme Court of the United States, copies of which decrees & judgments and the said decree of the said United States circuit court rendered in obedience to the said decree & mandates of said Supreme Court in said suit No. 82 are hereto annexed and made parts of this bill for greater certainty; and because no proper steps have been taken to examine said S. B. Davis as to any as-
300 sumed and alleged contradiction by which, if any, the same might be explained, and because no authorizations of S. B. Davis to the alleged counsel in said suit to institute said suit; which objection being overruled by the court, and the said testimony admitted, defendant's counsel excepted to said ruling of the court, and tender their bill of exceptions, after exhibiting the same to the opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant July 6th, 1871.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

Be it remembered that on the trial of this cause, this 10th June, 1871, counsel of plaintiffs and intervenors offered in evidence, for the pur-
301 pose of contradicting the testimony of the witness, J. D. D. Bellechasse, the documents purporting to be letters of said Bellechasse, dated 31 Nov. 9, 1814, January, 1816, and Oct. 23, 1822, which four letters are found in the *called* New Orleans record, vol. 2, pages 1074 to 1079, and in connection therewith, to prove the genuin'ess of said letters, the deposition of Zacharie, in suit No. 122, and found in the New Orleans record, vol. 2, pages 374 to 376, to the admission of which, in evidence, defendant's counsel objected on the ground that said testimony is irrelevant, and because said letters are not properly and sufficiently authenticated; and further, because no proper steps have been taken to examine said Bellechasse as to any assumed contradiction between the statements in said letters and the said testi-
302 mony of the witness Bellechasse, but which objections were overruled by the court and said evidence admitted, defendant's counsel objected, and tender this their bill of exception, after exhibiting the same to opposite counsel, that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant July 6th, 1871.

JOS. FUENTES & AL. *vs.* MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

Be it remembered that on the trial of this cause, on the 10th day of

June, 1871, counsel of plaintiff offered in evidence the document purporting to be a marriage certificate of Jerome Desgrange and Maria Zulime Carrière, in New Orleans, 1794, as found on pages City of New Orleans Record, 1054 to 1040, and on record No. 122, pages 748 to
302 751; to the admission of which, in evidence, defendant's counsel excepted on the grounds:

That said testimony is irrelevant to the issue involved in this cause; and so far as the same is intended to dispute the status of the defendant, Myria Clark Gaines as the legitimate child of the said Daniel Clark, the same is inadmissible on the ground that said issue is not cognizable in this cause; that said issue of status has become a thing adjudged and is res judicata as against the plaintiffs and intervenors in this cause in cases instituted and determined by the Supreme Court of United States, and wherein the said status of this defendant was made an issue, and decree of said Supreme Court of the United , and by decrees of the U. S. circuit court for the district of Louisiana,
304 rendered in pursuance of said decrees of the Supreme Court of the United States, and specially in the cases entitled "Myra Clark Gaines vs. Duncan N. Hennen," No. 221 of the docket of said court, decided by the said Supreme Court in its December term, 1860; and "Myra Clark Gaines vs. The City of New Orleans & al," No. 82 of the docket; and "Myra Clark Gaines vs. F. D. Delacroix & al.," No. 81 of the docket; and "Myra Clark Gaines vs. Manuel J. Lizardi & al," No. 83 of the docket, and which three last-mentioned cases were decided at the December term, 1867, of said Supreme Court of the United States, copies of which decrees and judgments, and the said decree of the said United States circuit court, rendered in obedience to the said decree and mandates of said Supreme Court in said suit No. 82, are hereto annexed and made part of this bill of exceptions for greater
305 certainty; which objections being overruled by the court, and said testimony admitted, defendant's counsel excepted to the said ruling of the court, and tender this their bill of exception, after exhibiting the same to the opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant July 6th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Be it remembered that on the trial of this cause, this 10th June, 1871, counsel of plaintiffs & intervenors offered in evidence the testimony of Peter A. Brown, found in the printed New Orleans Record, pages 892 to 898, vol. 1, for the purpose of contradicting and impeaching the testimony of S. B. Davis & Mrs. Smythe, to the admission of which in
306 evidence defendant's counsel objected on the grounds that no interrogatories propounded to said Brown referred to any action or statements of said S. B. Davis and Mrs. Smythe, and what by said Brown may have, in his said answers, been stated regarding said acts or words of said Davis or Smythe are not responsive to the interrogatories, and therefore inadmissible; further, because the statements as to said Mrs. Smythe are ex parte, and respondent was taken by surprise as to said state-

ments; that said testimony of said Brown was given in another suit between different parties and is inadmissible herein, and because no proper steps have been resorted to or taken to examine said S. B. Davis and Mrs. Smythe as to any assumed contradiction in their testimony and statements; & that most of said Brown's testimony is irrele-
307 vant, is hearsay, and no' responsive to the questions propounded to him; and that so far as said testimony may tend to dispute or question the status of defendant as legitimate child of said Daniel Clark the same is inadmissible, on the grounds that said issue is not cognizable by this court in this cause, and said issue is res judicata as against said plaintiffs and intervenors by the judgments of the Supreme Court of the United States and by the circuit court of the United States for the district of Louisiana, as fully set forth in defendant's plea of res judicata filed in this cause, and to which reference is made; and because said answers regarding said status are not warranted by the interrogatories; which objections being overruled by the court and said testimony admitted, defendant's counsel excepted and tender this their bill of excep-
308 tions to said ruling, after exhibiting the same to opposite counsel, that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant July 6th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA CLARK GAINES. } No. 32979.

Be it remembered that on the trial of this cause, on this 10th June, 1871, counsel for plaintiffs and intervenors offered in evidence the documents purporting to be letters of Daniel Clark to D. W. Cox, dated 29 Jan'y, 1812, & 12 Jan'y, 1808, 9th Feb'y, 1808, & 14th Feb'y 1808, & found in New Orleans Record, pages 939-940, and also bills of sale Daniel Clark to J. D. Bellechasse, on 14 May, 1811, on page 1048 to 1089 of 2d vol. New Orleans Record, and the act of sale of D. Clark to
309 J. D. Coxe, 9th April, 1833, in said record, pages 542, 546, and act of sale of F. D. Delacroix to M. Clark, through S. B. Davis, her curator ad bona, dated May 16, 1820, in record, vol. 2, p. 1049, 1050; o the admission of which in evidence defendant's counsel objected on he groun d of irrelevancy; which objections being overruled, defendants ounsel e xcepted & tender this their bill of exception, after tendering the same to opposite counsel, that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant June 6th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

Be it remembered that on the trial of this cause, on 10th June,
310 1871, plaintiffs & intervenors' counsel offered in evidence the document purporting to be the will of Mary Clark, as found in printed

record, vol. 2, city record pages 73–75; to the admission of which in evidence defendant's counsel objected on the ground that the same is not properly authenticated as genuine, is irrelevant to the issue involved in this cause; which objection being overruled by the court & said document admitted, defendant's counsel excepted, and tenders this their bill of exceptions, after submitting same to opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant July 6th, 1871.

JOSEPH FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

311 Be it remembered that on the trial of this cause, this 10th day of June, 1871, counsel of plaintiffs and intervenors offered in evidence, for the purpose of contradicting the testimony of the witness J. D. D. Bellechasse, the document purporting to be a translation of a certain letter of said Bellechasse to D. W. Coxe, dated Dec. 10, 1819, and found in the New Orleans Record, vol. 1, pages 854 to 856, and in connection therewith and to prove the loss of the original, its genuine'ss as a true copy of said original, the deposition of J. W. Cope & G. B. Duncan, and indorsement thereon by F. Perin, solicitor, as found on pages 854 to 857 of same volume, to the admission of which, in evidence, defendant's counsel objected, on the ground that said letter of Bellechasse was not duly proved as genuine; that said depositions of
312 Cope & Duncan did not establish its genuine'ss, nor did said indorsement by F. Perin, solicitor, *did not* authorize its admission as evidence in the suit at bar; and further, because no evidence of loss of said original letter or search therefor, if lost, have been shown; and further, because no proper steps have been taken to examine said Bellechasse as to any contradiction, if any it be pretended, between the statements in said letter and the testimony of said witness thus attempted to be attacked; and further, because said letter is irrelevant to any issue in this cause; but which objections having been overruled by the court, and said letter, depositions, and endorsements , defendant's counsel excepted to ruling, and tender this their bill of exceptions, after exhibiting the same to opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

313 *Bill of exceptions.—Filed by defendant July 6th,* 1871.

JOS. FUENTES & AL.
vs.
MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

Be it remembered that on the trial of this cause, on this 10th June, 1871, counsel of plaintiffs and intervenors offered in evidence the document purporting to be the petition filed in this court on 18th June, 1834, by defendant, to prove her admission of the fact that Mary

Clark, the mother of Daniel Clark, had accepted the succession of Daniel Clark, and that the heirs of said Mary Clark had been put in possession of the property thereof, said petition being found on pages 708 to 710 of 2nd vol. of city record, to the admission of which, in evidence, defendant's counsel objected on the ground that said
314 testimony is irrelevant to the issues involved in this cause; that it is but a portion of said record; that it is a matter and res inter alios acta; that no allegation in plaintiffs' petition calls for such testimony; which objections being overruled by the court and said testimony admitted, defendant's counsel excepted and tender this, their bill of exceptions, after exhibiting the same to opposite counsel, that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant July 6th, 1871.

JOSEPH FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

Second district court for the parish of Orleans.

Be it remembered that on the trial of this cause the plaintiffs offered to read in evidence the copies of the joint answers of Richard
315 Relf & Beverly Chew to the bill in chancery in the case of Gaines & husband against said Relf, Chew, & others, filed in the circuit court of the United States, which said copy of said answers is noted by the clerk of this court as No. 4 of evidence, the answers of Relf & Chew, filed 14th January, 1845, in suit of Gaines vs. Relf, Chew, & als., No. 122, U. S. circuit court; and thereupon the said defendant, Myra Clark Gaines, objected to the introduction of said copy in evidence on the ground that no evidence could, after this lapse of time, be received to attack or impugn the judgment of the supreme court of Louisiana, establishing said will of Daniel Clark, of the year 1813, which had acquired the force of the thing adjudged, because the decrees of the Supreme Court of the United States in the cases
316 of this defendant Myra Clark Gaines & husband against Duncan N. Hennen, Myra Clark Gaines vs. the City of New Orleans, Myra Clark Gaines & husband vs. Lizardi & al., and Myra Clark Gaines & husband vs. Dussau Delacroix, has declared the status of this defendant to be that of legitimate heir of said Daniel Clark, deceased; because the said plaintiffs are and every of them is without any right or authority to question the status of defendant of universal legatee under the said will of said Daniel Clark of the year 1813, and to question her status as legitimate heir of said Daniel Clark, deceased.

Because said joint answer of said Relf & Chew was in a suit between other parties than the parties to the present suit, and the issues were different, and because the said defendants were not interrogated
317 under oath, and their answers were put at issue by a replication, because said answers were postritem motam, and it is contrary to law & evidence that the allegations of a party in his own favor should be read in evidence by other parties, not parties to such controversy, and because answers in chancery are not admissible in evidence in other suits, and stands as decla'tions of a party in his own favor, and against his adversary, and as the defendant is and was deprived of all benefit of cross-examination of said Relf & Chew as witnesses, and because

there is no obligation on a suitor to offer testimony she believes to be false, erroneous, or untrue, and because said answer was prepared by counsel in the interest of said Relf & Chew as a defence to their action in which they were directly interested, and was filed in the year
318 1845, and said testimony is inter alios, illegal, & irrelevant.

But the court being of opinion that said answers were admissible in evidence, allowed the same (for reasons orally given) to be received in evidence, and thereupon the defendant by counsel then and there excepted to said ruling of the court and admission of said answer of said Relf and Chew in evidence, and tendered to the court this her bill of exception for signature and allowance, which is done.

(Signed) T. WHARTON COLLENS, *Judge.*

Act of sale of land by Ricard Relf and Beverly Chew, ex., to George Matthews. —Filed on behalf of intervenor, Matthews, Sept. 11, 1871.

Be it known that this day before me, John Lynd, notary public, in
319 and for the city and parish of New Orleans, duly commissioned, personally appeared Richard Relf and Beverly Chew, esqrs., both of this city, executors of the last will of the late Daniel Clark, esq., of this city, deceased, who declared that in their said capacities as executors and attorneys aforesaid, they do by these presents grant, bargain, & sell unto George Matthews, esq., also of this city, present & accepting, a certain tract or parcel of *of* land, situate in the parish of Rapides, in this State, having sixteen & three-tenths arpents of front on each side of the Bayou Bœuf in said parish, with all the depth belonging to said front; being a part of the land purchased from the Choctaw, Biloxi, and Pascagoula Indians by Miller and Fulton, and conveyed by them to the said Daniel Clark, by act passed before Peter Pedesclaux, then a notary in this city, dated on the 10th of June, 1806; and adjoining on
320 one or both sides a tract of twelve and a half arpents of front on both sides of said Bayou Bœuf, which was sold by said Daniel Clark, in his life-time, to Daniel M. Kimball, now owned by this purchaser, including also in said sixteen $\frac{3}{10}$ arpents, six and one-fourth arpents fronting on the left bank of said Bayou Bœuf, already sold to him, the said purchaser, by William Miller, as agent for them, the said sellers, and which has already been paid for: To have and to hold the said sixteen and three-tenths arpents front & all the depth thereunto belonging as aforesaid un*der* the said George Matthews, his heirs & assigns, to his and their only proper use and behoof, forever, and the said executors and attorneys hereby bind themselves, their successors & principals,
321 the said tract of land, with all the rights, commodities & appurtenances to the said belonging, to warrant, and defend against all persons whomsoever claiming or to claim, by, through, or under the said Daniel Clark, or his heirs, by these presents, unto the said George Matthews, his heirs, & assigns.

This sale is made and confirmed for the consideration of the sum of three thousand one hundred and fifty dollars, including the price of the said six and a quarter arpents heretofore sold, receipt of which sum is hereby acknowledged by said sellers, together with the further sum of one hundred and eighty-nine dollars for one year's interest in the foregoing sum, this sale having been verbally agreed upon by the said parties in the month of January, 1817, and the said consideration to
322 have been paid at the expiration of one year from said date, but unavoidable circumstances having delayed until the present the

execution of the title-deeds, interest as aforesaid is paid for said sum, and receipt thereof also hereby acknowledged.

Thus done and passed at New Orleans aforesaid, this sixteenth day of January, in the year one thousand eight hundred & nineteen, in the presence of Jules Davezac and Hugh K. Gordon, witnesses, who hereunto sign their names with the said parties and me, notary.

(Original signed:)

RICHARD RELF.
BEV. CHEW.
GEO. MATHEWS.
H. K. GORDON.
JULES DAVEZAC.
JOHN LYND, *Not. Pub.*

STATE OF LOUISIANA,
City of New Orleans:

I, Andrew Hero, jr., a notary public in and for the parish of
323 Orleans, State of Louisiana, and the custodian of notarial records of said parish, duly commissioned and qualified, do certify that the foregoing is a true & correct copy of the original act extant in the records of John Lynd, late a notary in this city, and whose records are in my custody as custodian aforesaid.

As witness my hand & seal at New Orleans, as cu'todian aforesaid, this twenty-fourth day of July, A. D. 1871.

(Signed) ANDREW HERO,
Custodian of Notarial Record.

Note of evidence taken in open court & filed Sept. 11th, 1871

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES. }

324 Counsel for plaintiffs offered in evidence:

No. 49. Letter written by Desgranges dated 24th July, 1801, as found in printed record of suit No. 122, pages 801 & 802.

And in connection with said letter, the note of evidence on page 1011 of same record, being evidence taken before J. W. Gurley, commissioner, on 23rd June, 1849.

No. 50. Bills and answers in the said suits No'. 2734, 2695, 3663, 6085, 4006 & 122, in the said circuit court of the United States, district of Louisiana, to show that the plaintiffs herein have been severally sued by said defendant, Mrs. Myra C. Gaines, for property as alleged by said plaintiffs in their petition herein, and that said will of 1813 has been set up against them therein as mumiment of title.

325 Also No. 51. Admissions & agreements as to title and change of title, and possession in the said suit 2734, 2619, & 2695, as found in the printed New Orleans Record, vol. 1, pages 86 & 87, as to the following parties who filed answers therein, being the same parties who in the pleadings herein assert title from D. Clark, through Chew & Relf, executors; and as attorneys in fact of Mary Clark, his mother, & sole heir, to wit: The City of New Orleans, E. G. Lanuyer, F. Massena,

William Crippel, John Diamond, Josiah Cole, R. & C. Carite. The agreement on page 86, being filed October 22d, 1857, & the one on page 87, filed October 31, 1857.

Also No. 52. The will of Daniel Clark, dated May the 20th, 1811, together with the procès verbal of opening & proof thereof, as set forth on pages 12 & 13 of the printed record.

326 Also No. 53. The procès verbal of affixing seals by G. Preval, justice of the peace, on the 16th August, 1813, as found in the printed record, pages 9 & 10, and the translation thereof as found in said printed record, pages 254 & 255.

Also No. 54. All that portion of the record of the succession of Daniel Clark, relating to the probate of the said will, dated May the 20th, 1811, to show the proper administration & the final settlement of said succession by Richard Relf and Beverly Chew, executors, under said will of 20th May, 1811, to wit, the following, as found in the printed probate record, at the pages as herein below indicated—

Procès verbal of affixing seals ..... page .. 11
Petition of F. D. Delacroix ..... " .. 11
Affidavit ..... " .. 12
Order ..... " .. 12
Procès verbal of opening & proof of the last will of Daniel Clark ..... " .. 12
327 Proof of will ..... " .. 12
Petition of Relf, to remove seals ..... " .. 13
Order ..... " .. 13
Inventory ..... page 14 to 57
Petition for sale ..... page .. 58
Order ..... " .. 58
Petition of R. Relf ..... " .. 58
Order ..... " .. 59
Petition of R. Relf, for letters ..... " .. 59
Oath of test'y exr. R. Relf ..... " .. 59
Letters test'y exr. to R. Relf ..... " .. 60
Petition for new appraisement ..... " .. 60
Order ..... page 60 to 61
Petition of B. Chew, for letters ..... page .. 61
Oath of testy. ex'r to B. Chew ..... page 61 to 62
Power of att'y of Mary Clark to Relf & Chew ..... page 71 to 73
Will of Mary Clark ..... page 73 to 76
Power of att'y from executors of Mary Clark to Relf & Chew ..... page 76 to 77
Petition of Relf & Chew for the homologation of their account in this succession ..... pages 83 & 84
Order ..... page .. 84
Account of administration of Relf & Chew, executors of D'l Clark ..... page 84 to 106
Act of copartnership, referred to & annexed to account of Relf & Chew ..... pages 106 to 107
328 Letter referred to and annexed to account of Relf & Chew ..... page .. 108
Copy of letter from George Green, jr., to Jas. Reed, annexed to account of Relf and Chew ..... page 108 to 110
Rule on Relf & Chew ..... page .. 110
Sheriff return ..... " .. 110
Rule of A. Hoa ..... " .. 111

Sheriff return..... " .. 111
Judgment homologating account of Relf & Chew, so far as not opposed..... " .. 129

Also No. 55. Certificate of the clerk of the United circuit court, district of Louisiana, showing the date of filing therein, in said court, the bills severally in the said suits, Nos. 3663, 6085, & 4006.

The court admits the power of att'y of Mary Clark to Relf and Chew, above referred to only in connection with the purposes above stated—and as being on file in the record, and as showing that Chew & Relf acted under it.

329 *Order: Case continued, as entered in the minutes of September 11th, 1871.*

Second district court for the parish of Orleans, Hon. T. W. Collens, presiding.

JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

This case came up this day regularly for further trial—present, M. Taylor & J. McConnell, for plffs.; Fellows & Mills, for defendant—when, after hearing further evidence, the matter is ordered to be continued to Tuesday, September 12th instant, at eleven o'clock, a. m.

Order subpœna duces tecum.—Filed Sept. 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

On motion of M. Taylor and J. McConnell, of counsel for plain-
330 tiffs in the above-entitled suit, and on suggesting that A. Hero, notary public, has in his possession or under his control an original act of deposit, made before John Lynd, notary public, under date of April 22, 1817, made by B. Chew & R. Relf, of an act of procuration made to them by Mary Clark & dated October 1st, 1813;

And on further suggesting that it is necessary for the maintenance of the rights & interests of said plaintiffs that the original of said act of deposit, together with the original of said power of att'y, should be produced in court;

It is now ordered by the court that a subpœna duces tecum do issue herein, ordering the said A. Hero to bring & produce the said act of deposit and the said power of attorney of Mary Clark, in original before this court, on the trial of the above-entitled cause, on Tuesday
331 the 12th instant, at eleven o'clock, a. m.

Sheriff's return on above order of subpœna duces tecum.

Received September 11th, 1871, and on the 12th September, 1871, I served a true copy of the within rule on A. Hero, notary public, personally.

Returned same day.

(Signed) F. B. LAMBERT,
D'y Sheriff.

Note of evidence, taken in open court & filed Sept. 12th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

F. B. VINOT, deputy clerk of the United States circuit court, in answer to the summons served upon him, produces the original
332 deposition of D. W. Cox, taken in the city of Philadelphia in 1849, before W. H. Rawle, commissioner, taken in the suit No. 122, entitled "E. P. Gaines & wife vs. Relf & Chew & als., together with the exhibits to said deposition. Mr. Vinot states that will filed in suit No. 122 appears to have been filed in July, 1836.

ADOLPHE MAZUREAU, sworn on behalf of plaintiffs, says:

Examination-in-chief:

I am a resident of the city of New Orleans. The late Mr. Etienne Mazureau was my father. He died on the 25th of May, 1849. I am 65 years of age. I am familiar with my father's handwriting.

Question. Will you please examine the original of a letter annexed to the depositions of D. W. Cox, which is dated New Orleans, May the 1st, 1842, addressed to D. W. Cox, and signed "Mazureau," and state
333 if you have any knowledge in whose handwriting the said letter is?

Answer. The letter is entirely written and signed by my father, Mr. Etienne Mazureau. I am perfectly well familiar with my father' handwriting. I have often seen him write & sign. I am as familiar with his handwriting as I am with my own. My father was a member of the bar of New Orleans for great many years. My father was 72 or 73 years of age when he died.

(No cross-examination.)

FELIX GRIMA, sworn for plaintiffs, says:

Examination-in-chief:

Question. Will you please examine the original of a letter annexed to the depositions of D. W. Cox, which is dated New Orleans, May the 1st, 1842, addressed to D. W. Cox, and signed "Mazureau," and state
334 if you have any knowledge in whose handwriting the said letter is?

Answer. This letter is in the handwriting of Mr. Etienne Mazureau, and signed by him. I am going on 74 years of age. I was born in New Orleans, and I have always resided in New Orleans. Mr. Etienne Mazureau was my brother-in-law. I have resided with him & studied with him. I have every day seen him write & sign. I very often copied his petitions. I am as familiar with his handwriting as I am with my own. I am a member of the bar, and I have been a notary public for great many years. Mr. Etienne Mazureau was a very eminent member of the bar of New Orleans. He was the father of the witness, Mr. Adolphe Mazureau, who has just now testified. Mr. Etienne Mazureau always signed only "Mazureau."

335 Counsel for plaintiffs now offers in evidence:

No. 55. Letter of Mazureau annexed to the depositions of D. W. Cox, which is dated New Orleans, May 1st, 1842, addressed to D. W.

Cox. (Certified copy to be furnished by the clerk of the United States circuit court.)

Also No. 56. Certificate marked.

A. W. In answer to the writ of subpœna duces tecum, issued to him on the 11th instant, A. Hero, notary public, now produces in open court the documents called for by said writ of subpœna duces tecum.

Counsel for plaintiffs offers in evidence:

No. 57. The original power of att'y of Mary Clark to Relf & Chew, called for by the writ of subpœna duces tecum, issued on the 11th instant to A. Hero, notary public, and by him produced in court.

It is admitted that the copy to be found in the New Orleans
336 printed record is a true copy, and is to be used in place of said original.

Also No. 58. Opposition of Caroline Barnes, and joined therein by A. Hoa, att'y of absent heirs, to be found in printed probate record, page 111 to 117 inclusive; and also the discontinuance & judgment of court dismissing said opposition of Caroline Barnes & als., to be found in probate record, page 130.

Also No. 59, amended bill of Mrs. Myra C. Gaines & her husband, Gaines, filed November 28th, 1848, in said suit No. 122, as found in the New Orleans printed record, volume 2, pages 65 to 82, inclusive.

Also No. 60, decree & mandate of the Supreme Court of the United States, rendered in December term of 1851, in said suit No. 122,
337 as found in New Orleans printed record, volume 1, page 361.

Certificate marked A. W.—Filed in evidence on behalf of plffs, September 12th, 1871.

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I certify that the following suits in equity stand on the docket of said court, to wit:

MYRA CLARK GAINES *vs.* P. H. MONSSEAUX & ALS. } No. 3663.—Filed November 22, 1865.

MYRA CLARK GAINES *vs.* DENIS CRONAN & ALS. } No. 4006.—Filed June 9th, 1866.

MYRA CLARK GAINES *vs.* NORBERT LOUQUE & ALS. } No. 4031.—Filed June 10th, 1866.

338 MYRA CLARK GAINES *vs.* CHAS. LESSEPS & ALS. } No. 4051.—Filed July 16th, 1866.

MYRA CLARK GAINES *vs.* P. F. AGNELLY & ALS. } No. 6085—Filed Feb'y 12th, 1870.

Witness my hand and seal of said court, at New Orleans, this 11th day of September, A. D. 1871.

(Signed) F. A. WOOLFLEY, *Clerk.*
By F. B. VINOT, *Dy. Clerk.*

Order, case continued, as entered in the minutes of September 12th, 1871.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

JOS. FUENTES & ALS.
vs.
MYRA CLARK GAINES. } No. 32979.

339 This cause came up this day as per continuance from 11th instant—present, M. Taylor & J. McConnell, for plaintiffs, Fellows & Mills, for deft—when, after hearing further evidence, the matter is ordered to be continued to September 14th, 1871, at 11 o'clock, a. m.

Note of evidence taken in open court, & filed September 14th 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS.
vs.
MRS. MYRA C. GAINES. } No. 32979.

ZACHARIE RELF, a witness sworn on behalf of plaintiff, says:

Examination-in-chief:

I am a son of the late Richard Relf, one of the executors of Daniel Clark, deceased. I am 85 years of age.

Question. Have you any knowledge as to where the following
340 parties are residing now, or whether they are living or dead, to wit: Mrs. Julia H. C. Wood, Mrs. Caroline Stannard, & Mrs. Anna M. Calender?

Answer. I have no knowledge of where these parties reside, or whether they are living or dead. I knew Mr. Chew during his lifetime. I was also acquainted with his family. I think that if Mr. Chew's sister was now living in New York, I would most probably know it. I never knew any of the three above-named parties to be present in New Orleans.

I have resided in New Orleans all my life.

Counsel for plaintiffs now offers in evidence:

No. 61. Testimony of Mrs. Julia H. C. Wood, Mrs. Caroline Stannard, & Mrs. Anna M. Calender, as found in the New Orleans printed record, vol. 2, page 519 to 536 inclusive.

341 No. 62. Deposition of G. Preval, taken May 2d, 1834, as found in printed probate record, page 82, to contradict & explain his testimony taken and offered by Mrs. Gaines on the 15th February, 1855, for the probate of the will.

No. 63. In order to prove the value of property in dispute in this cause approximatively, plaintiffs offered in evidence a demand made by the defendant herein upon the city of New Orleans for the sum of $4,996,039.32, making the basis of her said demand, her claim as heir of Daniel Clark, under the alleged will of 1813.

Copy to be furnished.

Order: *Case continued, as entered in the minutes of September 14th*, 1871.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

JOSEPH FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

342 This case came up this day as per continuance from the 12th inst.—present, M. Taylor & J. McConnell, for plffs., Fellows & Mills, for deft.—when, after hearing further evidence, the matter is ordered to be continued to September 21st, 1871, at eleven o'clock a. m.

Note of evidence, taken in open court & filed September 21st, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

The objections to the statements of the witness of the declarations of Pitot are overruled by the court, and considering that Pitot died before the litigation commenced and the lenght of time which has elapsed, these statements are admitted as a corroborative circumstance
343 supporting the direct testimony of witnesses who testified from their personal knowledge to the existence of the will from having seen; but not from having any effect by itself to prove a will or its contents.

The court excludes as evidence in the case at bar that portion of the deposition of D. Bellechasse as contained in his answer to 7th interrogatory, to be found in printed probate record, at page, 159, being the last twelve lines of said answer.

The court also excludes as evidence in said case the following portion of the answer of Boisfontaine to the 4th interrogatory, on page 149 of printed probate record, to wit: "Rubin told me that when Mr. Relf went down with the keys from the armoir, he followed, saw him then on getting down, going to the office room, and that Mr. Relf in going into the office, locked the office-room door."

344 Counsel for defendant offered in evidence:

No. 100. The record in the succession of Daniel, No. 8646, of the docket of the second district court of New Orleans, on an application of Myra Clark Gaines for the probate of the will of Daniel Clark.

Also, No. 101. All the evidence and testimony and documents offered therein as evidence on the application to probate will, not offered in evidence by plaintiffs in this suit, No. 32979, as contained in the printed probate record.

Also, No. 102. The testimony taken under commission of Samuel B. Davis, to be found at page 273 to 289 inclusive, of printed New Orleans record, vol. 2.

Also, No. 103. Testimony of Mrs. Henrietta Smythe, to be found in New Orleans printed record, vol. 2, at page 212 to 226 inclusive.

345 No. 104. Upon the plea of res judicata as to the status of defendant, filed June 3d, 1871.

Counsel for defendant offers: Decrees of the Supreme Court of the

United States rendered in the cases entitled "Myro Clark Gaines, complainant & appellant, vs. Duncan N. Hennen, No. 221 of the docket of the said Supreme Court, and which decree was rendered at the December term, 1860, of said Supreme Court; and of Myra Clark Gaines, appellant, vs. The City of New Orleans & al., No. 82 of the docket of said court; of Myra Clark Gaines vs. F. Delacroix & al., No. 81 of the docket of said court, and of Myra Clark Gaines vs. Manuel J. Lizardi & al., No. 83 of the docket of said court, and in which last three cases the decrees of said Supreme Court were rendered at the December term, 1867, and by decree of the United States circuit
346 court for the district of Louisiana, rendered in pursuance of the said decrees of the Supreme Court, at its April term, 1870, all of which more fully appear by certified copies of said decrees.

Copies to be furnished.

Now, resuming the offering of evidence upon the general issue, counsel for defendant offers:

No. 105. Testimony of Mme. Sophie Despau, to be found on page 244 to 246, inclusive, of the New Orleans printed record, vol. 2.

No. 106. Testimony of Rose Caillabat, to be found in pages 256 to 259, inclusive, of New Orleans printed record, vol. 2, with the commissions to Wm. H. Cleaver, to be found on page 249 of said record. Also the order of court for the issuance of commission, on page 249 same record.

(These depositions are admitted, except the declarations therein contained of prosecution & conviction of Desgranges for bigamy,
347 which are excluded:)

Counsel for defendant further offers:

No. 107. Testimony of Right Reverend Philander Chase, with commission under which it was taken, to be found on page 290 to 302 inclusive, of New Orleans printed record, vol. 2.

Motion to exclude, and grounds therefor.—Filed September 21st, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. vs. MYRA C. GAINES. } No. 32979.

The said plaintiffs, by their counsel, reserving all legal rights, and not waiving their right to treat the testimony hereafter referred to as not being legally before this honorable court until the same shall have been actually offered in evidence by the defendant in the present
348 cause, finding the testimony referred to marked as having been filed by said defendant in the ex-parte proceeding by her to obtain the probate of the will attacked, to wit, on the 15th and 16th of February, 1855, do now respectfully move the court to exclude said testimony and evidence so offered by said defendant upon the following grounds, to wit:

What purports to be a deposition of Mrs. H. Harper or Smythe, as found in the printed probate record, pages 132–145 inclusive, because,

1°. It is not legally authenticated as the sworn deposition of said witness.

2°. Because it purports to have been taken under a commission, which commission & certificate of the commissioner, if there was one, should be annexed.

3°. The deposition is not sworn to by said witness.

349 What purports to be a deposition of J. D. D. Bellechasse, as found in said printed probate record, pages 151–165 inclusive:

Because, 1°. Not legally authenticated as the sworn deposition of said witness.

2°. Because the commission under which it purports to have been taken is no' produced.

3°. Because the deposition was not sworn to by said witness.

The deposition of Mrs. Harriett Harper, afterwards Mrs. Smith or Smythe, purporting to have been taken in writing under a commission issued in the suit of the defendant against Eleanor P. Bearn & al., and afterwards offered in evidence by the defendant, Mrs. Myra Clark Gaines, as found and contained in the printed record known as the "probate record" before the court, at pages 135, 136, 137, 138,
350 139, 140, 141, 142, 143, 144, & 145, upon the application of the said defendant, Myra Clark Gaines, to obtain the probate of the will which has been attacked in this cause, for the purpose of having the probate of the same revoked, recalled, annulled, and set aside.

And the deposition of J. D. D. Bellechasse, offered in evidence by the defendant, Mrs. Myra Clark Gaines, as found & contained in the said printed probate record before the court, at pages 157, 158, 159, 160, 161, 162, 163, 164, & 165, and from 191 to 195, inclusive, upon the application of the said defendant, Mrs. Myra Clark Gaines, to obtain the probate of the said will attacked in this case as aforesaid.

The plaintiffs in this case move the court to declare that the said depositions of the said Harriet Harper and of the said J. D. D. Bellechasse were not legal & competent evidence to prove the *the* execution
351 of the will then propounded & set up, and to order that the same be excluded from any consideration as evidence against the plaintiffs in this case to prove the said pretended will, on the ground that it is nowhere stated or shown in the said depositions, or either of them, that either of the said witnesses had attested that they recognized the said will "as entirely written, dated, & signed in the testator's handwriting, as having often seen his write & sign during his life-time."

And the said plaintiffs in the case further move the court to order so much of the said depositions of the said Harriet Harper and of the said J. D. D. Bellechasse to be excluded from consideration as evidence in this case against plaintiffs as contain any statement or mention of declarations made by the said Daniel Clark of his intention of making a
352 will, or of his having made a will, on the ground that no proof of parole declarations of the said Daniel Clark as to his intention to make a will, or of his having made a will, are admissible in evidence until it has been first proved by legal evidence, 1st, that a will had been duly executed by the said Daniel Clark; & 2d, that it was in existence at the time of his death, or had been accidentally or fraudulently destroyed without her knowledge or consent.

And the said plaintiffs in this case further move the court to order so much of the deposition of the said J. D. D. Bellechasse as relates to declarations made to him by Judge Pitot, and contained in the last 16 lines of his answer to the 6th interrogatory, on page 158 of the said printed "probate record," as to the suppression or destruction of a will of the said Daniel Clark, to be excluded from consideration as evidence in
353 the case against plaintiffs, on the ground that said declarations were mere hearsay, and not legal evidence.

And the said plaintiffs in the case further move the court to order so much of the depositions of the said J. D. D. Bellechasse as is contained

in his answer to the 7th interrogatory and found on page 159 of the said "probate record," and which is in the following words: "I think it my duty now to declare what I know to be a fact, that said Desgrange was condemned for bigamy in marrying Miss Carrière (subsequently the mother of Myra) seven years prior to the birth of said Myra. The prosecution and condemnation of said Desgrange for said crime of bigamy took place at New Orleans, and towards the close of the Spanish domination in Louisiana, his first & lawful wife, whom he had married previous to his coming to Louisiana, coming to New Orleans in pur-
354 suit of him. When said Desgrange practised the infamous deception of marrying Miss Carrière, it was the current opinion in New Orleans that he was as bachelor." As also similar statements of said witness be excluded from consideration as evidence in this case against plaintiffs, on the ground that any connection for bigamy must have been had by proceedings at law, had before a competent judicial tribunal of which written records were in existence, and that the parole statements of the said J. D. D. Bellechasse are not the best evidence of such a conviction.

And the depositions of P. Baron Boisfontaine, having been taken in writing, on or about the 20th day of May, 1835, and having been offered in evidence by the defendant, Mrs. Myra Clark Gaines, as found & contained in the printed copy of the said probate record now
355 before the court at page 145, 146, 147, 148, 149, 150, & 151, upon the application of the said Myra Clark Gaines to obtain the probate of the said will attacked in this case as aforesaid.

The plaintiffs in the case move the court to order so much of the depositions of the said P. Baron Boisfontaine to be excluded from consideration as evidence in this case against plaintiffs, as contain any statement or mention of declarations made by the said Daniel Clark of his intention of making a will, or of his having made a will, on the ground that no proof of parole declarations of the said Daniel Clark as to his intention to make a will, or of his having made one, are admissible in evidence until it has been first proved by legal evidence—

1st. That a will had been duly executed by the said Daniel Clark; &,
2d, that it was in existence at the time of his death, or had been
356 accidentally or fraudulently destroyed without his knowledge or consent.

And the said plaintiffs in the case further move the court to order so much of the depositions of the said P. Baron Boisfontaine as relate to declarations of Judge Pitot, John Lynd, & the wife of William Harper, made to him, and contained in his answer to the 6th interrogatory, and found on page 149 of the probate record as to the execution or existence, or suppression, or destruction of a will of the said Daniel Clark to be excluded from consideration as evidence in the cause against plaintiffs, on the ground that the said declarations to him were hearsay, and not legal evidence.

And the said plaintiffs in the case further move the court to order so much of the depositions of the said P. Baron Boisfontaine, as is
357 contained in his answer to the 2d cross-interrogatory, and to be found on page 150 of said "probate record," and which is in the words following: "To answer this question in detail, as is demanded, it is necessary that I state what was commuicated to me. It was represented to me that this lady married Mr. Desgrange in good faith, but it was found some time afterwards that he had already a living wife, when the lady née Carrière separated from him; Mr. Clark some time after this married her at the North; when the time arrived for it to be made

public, interested persons had produced a false state of things between; & this lady living in Philadelphia & Mr. Clark was then *was* persuaded by a lawyer employed that her marriage with Mr. Clark was invalid, which believing, she married Monsieur Gardette," be excluded from consideration as evidence in this case against plaintiffs, on the ground that the said statement was made upon information
358 from others, and not from his own knowledge; that the same was mere hearsay, and is not legal evidence.

And the said plaintiffs further move the court to order so much of the depositions of the said P. Baron Boisfontaine as is combined in his answer to the 4th interrogatory, and which is found on page 149 of the said "probate record," and is in the following words: "Lubin told me that when Mr. Relf went down with the keys from the armoir, he followed, saw him then, on getting down, go into the office-room, and that Mr. Relf on going into that office-room locked the office-room door," be excluded from consideration as evidence in this case against plaintiffs, on the ground that the said statement as to what Lubin said to him was mere hearsay, and not legal evidence.

359 Plaintiffs also move to exclude the following: In testimony of Bellechasse, in his answer to 6th interrogatory-in-chief, the last sixteen lines as found in printed probate record, page 158.

Also all the answer to cross-interrogatory 11, page 162, and the last twelve lines of his answer to 13th cross-interrogatory, same record, p. 163, because said answers are—

1st. Irrelevant.
2d. Mere hearsay.
3d. Matter of opinion of the witness.

Also to exclude as hearsay and matter of opinion from testimony of Bellechasse, as found in printed probate record, page 193, the words: "Judge Pitot, as well as others, always spoke with the utmost indignation of the suppression or destruction of said last will of 1813, and the substitution of that of 1811, all of which we attributed to interested villany."

360 Also to move to exclude so much of the deposition of G. Preval as is found on page 8 of the printed probate record as goes to contradict or vary the official return in writing, to wit, the procès-verbal of the affixing the seals made by him, and his declarations therein contained.

Order case continued, as entered in the minutes of Sept. 21st, 1871.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

This case came up this day as per continuance from the 14th instant—present, M. Taylor & J. McConnell, for pl'ffs; Fellows & Mills, for defendant—when, after hearing further evidence, the matter is continued until to-morrow at 10 o'clock a. m.

Note of evidence taken in open court & filed September 22d, 1871.

Second district court for the parish of Orleans.

361 JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No 32979.

Counsel for defendant offered in evidence—

No. 108, testimony, taken under commission, of J. D. D. Bellechasse, to be found in New Orleans printed record, volume 2, page' 226 to 241, inclusive.

Also, No. 109, testimony, taken under commission, of Mrs. Henrietta Smith, in printed record No. 122, pages .

Also, No. 110, testimony, taken under commission, of Mrs. Henrietta Smith, to be found in New Orleans printed record, vol. 1, page' 141 to 152.

No. 111, testimony taken, under commission, of Peter Joseph Baron Boisfontaine, & his wife, Amiée née Ducannary Baron Boisfontaine, to be found in New Orleans printed record, vol. 2, page' 941 to 951, inclusive.

362 No. 112, testimony of Elliott Robin, and inscription on tombstone to prove date of Clark's death, to be found on pages 176 & 177 of New Orleans printed record, vol. 1.

No. 113, testimony of Jno. S. Baron, taken before Robert M. Lusher, to be found in New Orleans printed record, vol. 1, page 231.

No. 114, testimony of G. W. Gurley, to be found in New Orleans printed record, vol. 1, page 186.

No. 115, depositions of Ellen Guenan, John Power, & Chas. E. Benson, taken at New York, May 9th, 1846, by Alexander Gardner, United States commissioner, with Exhibit A thereunto annexed, being latin certificate of marriage of J. Desgrange & Barbara M. Orey, July 6th, 1870, dated New York, 11 September, 1860, and signed Gulielmus O'Brien, pastor, &c.; and by Rey, in endorsement, admitted as proved,

363 to be found in volume 2, New Orleans printed record, page' 260 to 273, inclusive.

Also, No. 116, testimony of Mrs. Blondeau, to be found in New Orleans printed record, page 405, vol. 2.

Also, No. 117, testimony of A. Byrenheidt, on pages 305 & 306 of Now Orleans printed record, vol. 2.

Also, No. 118, testimony of Mrs. H. C. Nixon, in New Orleans printed record, pages 306 & 307, vol. 2.

Also, No. 119, testimony of Louise Reynoir, in New Orleans printed record, vol. 2, pages 307 & 308.

Also, No. 120, testimony of Sy. Guinaud, Catholic priest, in vol. 2, New Orleans printed record, page 309, with the commissions on pages 310 & 311, and interrogatories & cross-interrogatories on pages 303 & 300 of same record.

364 Also, No. 121, testimony of Mrs. Elizabeth Brasier, page' 320 & 321, of volume 2, of New Orleans printed record, with commission, interrogatories, & return of the said commission, on pages 328, 319, 320, & 322 of same record.

Also, No. 122, testimony taken, under commission, of Mrs. Cantrelle found on pages 310 to 314 of the New Orleans printed record, vol. 2.

Also, No. 123, testimony taken, under commission, of Lizzie Corrière, to be found on pages 341 & 342 of the New Orleans printed record, vol. 2.

Also, No. 124, testimony of Marguerite Chretien, pages 343 & 344, of New Orleans printed record, vol. 2.

Also, No. 125, testimony of J. J. Lonaillier, to be found on page 344 of New Orleans printed record, vol. 2.

Also, No. 126, testimony of Marie Lonaillier, on pages 344 & 335 of the New Orleans printed record, vol. 2, with commission, interrog-
365 atories & return of said commission, on pages 338 & 339, 340, & 351 of said record.

Also, No. 127, testimony of Lastie Dupré, on pages 345 & 346 of the New Orleans printed record, vol. 2.

Also, No. 128, testimony of Cyprien Dupré, on page' 346 & 347 of New Orleans printed record, vol. 2.

Also, No. 129, testimony of Etienne Lamorandier, on pages 347 & 348 of New Orleans printed record, vol. 2.

Also, No. 130, testimony of Marguerite Grenada, on pages 348 & 349 of New Orleans printed record, vol. 2.

Also, No. 131, testimony of Marie Louise Fontenot, on page 349 of New Orleans printed record, vol 2.

Also, No. 132, testimony of Cidales Thompson, on page 350 of the New Orleans printed record, vol. 2.

366 Also, No. 133, testimony of Theotiste Roy, on pages 350 & 251 of the New Orleans printed record, vol. 2, with the commission, interrogatories, & return of said commission, on pages 338, 339, & 340, & 351 of same record.

Also, No. 134, testimony of Azelie L. Foucher, taken under commission, and to be found in New Orleans printed record, vol. 2, pages 314 to 317, inclusive.

Also, No. 135, testimony taken, under commission, of Rev. Manuel F. Garcia, on pages 329 & 332 of the New Orleans printed record, vol. 2.

Also, No. 136, testimony of Dr. Anthonia Alma, on pages 325 & 326 of the printed New Orleans record, vol. 2.

Also, No. 137, testimony of Maria Clara L. Truffin, on pages 326 & 327 of the New Orleans printed record, vol. 2.

Also, No. 138, testimony of André de Torras, on pages 332 & 333 of the New Orleans printed record, vol 2.

367 Also, No. 139, testimony of Francis Ruelle, on pages 333 & 334 of the New Orleans printed record, vol. 2.

Also, No. 140, testimony of Eliza L. Ruelle, on pages 334 & 335 of the New Orleans printed record, vol. 2.

Also, No. 141, testimony of Jno. B. Sarrazin, on pages 335 & 336 of the New Orleans printed record, vol. 2.

Also, No. 142, testimony of Pedro de Torre, on pages 336 & 337 of the New Orleans printed record, vol. 2.

Also, No. 143, the testimony of José G. Zamora, on page 338 of the New Orleans printed record, vol. 2, with the commission, interrogatories, & return of said commission, on pages 322, 323, 324, & 338 of same record.

Also, No. 144, testimony taken before Gurley, commissioner, on
368 the 29th June, 1849, of Desiré Vignaud, on page 467 of printed record, No. 122.

Also, No. 145, testimony of M. S. Outlett, on page 467 of prin'd record, No. 122.

Also, No. 146, testimony taken before Lusher, U. S. commissioner, of Wm. T. Crawford, on 233 of the New Orleans printed record, vol. 1.

Also, No. 147, testimony of Peter K. Wagner, taken before Lusher,

U. S. commissioner, to be found on pages 233 & 234 of New Orleans printed record, vol. 1.

Also, No. 148, testimony of L. T. Beauregard, on page 234 of the New Orleans printed record, vol. 1.

Also, No. 149, testimony of Chas. Harrod, on page 235 of the New Orleans printed record, vol. 1.

Also, No. 150, the answers to the first four interrogatories propounded to Wm. Christy, on page 236 of the New Orleans printed record, vol. 1.

369 Also, No. 151, testimony taken under commission, of Louise Ve. Beauregard, on pages 782 to page 786, inclusive.

(This testimony is rejected by the court, with the exception of the following portions of the answer to the 6th interrogatory, to-wit: "The exposure at that time of the said Desgrange's bigamy, in marrying the said Zulime, was notoriously known in New Orleans." This is admitted so far as it tends to show that Clark may have had reasons for believing that Zulime Carrière had not been legally married to Desgrange.)

Also, No. 152, testimony of S. Smith, on page' 203 to 207 of the New Orleans printed record, vol. 1.

Also, No. 153, testimony of Wm. Gunt, on page' 208 & 209 of the New Orleans printed record, vol. 1.

370 Also, No. 154, testimony of John Douglas, on pages 209 to 213 of the New Orleans printed record, vol. 1.

Also, No. 155, testimony of J. Manouvrier, on page 212 to page 220, inclusive, of New Orleans printed record, vol. 1.

Also, No. 156, testimony of Jno. B. Child, on pages 220 to 225, inclusive, of the New Orleans printed record, vol. 1.

Also, No. 157, testimony of J. T. Hammond, on pages 226 & 227 of the New Orleans printed record, vol. 1.

Also, No. 158, certificate of Lusher, commissioner, with memorandum and exhibits identified with these depositions, to be found on page' 222 to 228, inclusive.

The above testimony of S. Smith, Wm. Gunt, John Douglas, J. Manouvrier, John B. Child, and J. T. Hammond, are offered only as
371 to the genuine'ss of the signature of Zulime Carrière to ecclesiastic record No. 141.

Counsel for defendant further offers—

No. 159, testimony of Jas. Foulhouse, on page 198 to 201, inclusive, of the New Orleans printed record, vol. 1.

Order, case continued, as entered in the minutes of September 22d, 1871.

Second district court for the parish of Orleans, honorable T. W. Collens presiding.

JOSEPH FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

This case came up this day as per continuance from yesterday—present, M. Taylor & J. McConnell, for plffs.; Fellows & Mills, for defendant—when, after hearing further evidence, the matter is continued until September 26th, 1871, at eleven o'clock a. m.

372 *Agreement.—Filed September 26th, 1871.*

Second district court for the parish of Orleans.

JOSEPH FUENTES & ALS. vs. MYRA C. GAINES. } No. 32979.

It is agreed that the copies of the printed volumes referred to in the notes of evidence may be filed on or before the close of the trial of the cause, and that when documentary evidence has been offered and not produced, the same may be filed hereafter.

And it is further agreed that in the event of an appeal being taken herein by either party to the supreme court of the State of Louisiana, that in making up the transcript or record of appeal, the spirit of the written agreement already made in regard to the use of the printed records used before the Supreme Court of the United States
373 shall be carried out. So that said printed records may be used and the transcript of appeal made up from them as to all matter so printed, without requiring in any case that matter so found in said printed records should be copied again in writing. And further, that in the argument & trial of the cause on such appeal before the supreme court of the State, the said printed records as printed for the use of the Supreme Court of the United States in the cases of Gaines vs. City of New Orleans, Gaines vs. Lizardi, Gaines vs. Delacroix, and Gaines vs. Richard Relf, & B. Chew & al., and Gaines vs. Hennen, may be used and referred to as to all matters contained in the record of this cause, and offered in evidence by either party.

And it is further agreed that the foregoing understanding and agreement shall apply to any appeal to, or writ of error sued out in the
374 Supreme Court of the United States in this case, should such appeal or writ of error be taken.

Nothing herein contained to be construed as conceding defendant's right to take such writ of error or appeal to the Supreme Court of the United States.

(Signed) J. McCONNELL,
For Plaintiffs.
FELLOWS & MILLS.

Note of evidence taken in open court and filed September 26th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. vs. MYRA C. GAINES. } No. 32979.

The court reconsidering its decision on the admissibility of the testimony of Mrs. Benguerelle, receives the same as found on page 782 of vol. 2, New Orleans printed record, which is the commission at pages 783, 784, & 785; the interrogatories and cross-interrogatories,
375 the procès-verbal of the Commissioner Perault, & caption, and the answers to the 1st, 2d, & 3rd interrogatories; that portion of the answer to the 4th interrogatory which says that Desgrange fled from Louisiana—the three last lines; the portion of the answer to the 6th interrogatory already received; the whole of the answer to the 7th

interrogatory, & the whole of the answers to the general cross-interrogatories.

Counsel for defendant now offers in evidence—

No. 160, testimony of Mme. Despaux, to be found in New Orleans printed record, vol. 2, page 606 to 610, inclusive.

This testimony is admitted, with the exception of hearsay declarations, conversations of third parties, statements & contents of letters, records, and suit and other written matter, which said statements are not the best evidence; the statement relative to the arrest, prosecution,
376 & condemnation of Desgrange for bigamy, and declarations made by others; but the court receives the confession of Desgrange as to his committing bigamy and the general rumors.

The court has heretofore excluded all testimony such as is excluded as above noted and described, leaving to the parties offering such testimony to take their bills of exception. This applies to both parties.

Counsel for defendant further offers—

No. 161, the testimony of Mrs. Rose Calliavuet, on page' 655 to 657, inclusive, of vol. 2, New Orleans printed record.

Also, No. 162, testimony of Mme. Despaux, vol. 2, New Orleans printed record, page' 647 to 651, inclusive.

Also, No. 163, testimony of Mme. Rose Calliavuet, on page 651
377 to page 654, inclusive, of New Orleans printed record, vol. 2, with commission & interrogatories, page' 642 to 642, same record.

Also, No. 164, testimony of Samuel B. Davis, on page' 968 to 1003, & from 1003 to 1045, inclusive, of New Orleans printed record, vol. 2, the exhibit marked "A," annexed to said testimony, is rejected.

Also, No. 165, certificate of F. B. Vinot, deputy clerk of the United States circuit court, now filed & marked "B. W."

Also, No. 166, testimony of H. Grant, in vol. 1, of the New Orleans printed record, page 229.

Evidence offered by defendant on the pleas of res judicata and of prescription.

No. 167, bill of complaint, filed in the suit of Myra Clark Gaines, appellant, vs. The City of New Orleans, upon the plea of res judicata
378 and upon the plea of prescription, to be found in the New Orleans printed record, vol. 1, pages 1 to 6, inclusive, together with exhibits annexed thereto, on pages 7 & 8 of same record.

Also, No. 168, subpœna to the city of New Orleans, to be found on page 9, of vol. 1, of the New Orleans printed record, and marshall's return on said subpœna, to be found on page 10 of same record.

Also, No. 169, subpœna to H. E. Lemeyer, on page 10 of the New Orleans printed record, vol. 1.

Also, No. 170, entry of a motion of pro-confesso against the city of New Orleans, Dominique Lanata, Chas. Hopkins, & H. E. Lemeyer, on page 11 of the said New Orleans printed record, vol. 1.

Also, No. 171, consent to set aside said pro-confesso, and to file an answer, on page 11 of said New Orleans printed record, vol. 1.

379 Also, No. 172, answers of the city of New Orleans, of D. Lanata, & of H. E. Lemeyer, pages 12 to 66 of said New Orleans printed record, vol. 1.

Also, No. 173, replication to answers, on page 71 of said New Orleans printed record, vol. 1.

Also, No. 174, petition of appeal, on page 79 of said New Orleans printed record, vol. 1.

Also, No. 175, decrees of the circuit court, rendered in pursuance of the decree of the Supreme Court in the cause of Myra Clark Gaines, appellant, vs. City of New Orleans & als. (Copies to be furnished.)

Also, No. 176, order allowing an appeal, page 79 of the New Orleans printed record, vol. 1.

Also, No. 177, citation of appeal to city of New Orleans, &
380 service thereon, page 3 of the said New Orleans printed record, vol. 1.

Also, No. 178, citation of appeal to H. E. Lemeyer, & service thereon, page 83 of the said New Orleans printed record, vol. 1.

Also, No. 179, bill of complainant, filed 27 March, 1857, in case of Myra Clark Gaines vs. M. De Lizardi & als., found in printed Lizardi record, referred to in agreement of counsel filed this 26th of September, said bill of complaint to be found page 1 to page 8, inclusive, of said record and exhibits A thereto attached, on pages 8 to 10, inclusive.

Also, No. 180, the joint & several answers of Owen Keating, John Diamond, Eliza P. Sinecal, & Wm. Cripple, on pages 17 to 82, inclusive, of the Lizardi printed record.

Also, No. 181, answer of Duncan N. Hennen, on page 10 to 13, inclusive, of the said Lizardi printed record.

381 Also, No. 182, replication to answers of Cripple & als., on page 83 of the said Lizardi record.

Also, No. 183, citations of appeal to Isabella Jenking, Jno. Slidell, John Diamond, Paul Pesquier, Elizabeth Mintorn, Eloise Mintorn, J. J. Lemoine, Widow Armand, Massena & Wm. Cripple, on pages from 982 to 987, inclusive, of said Lizardi printed record.

Also, No. 184, judgment in said case. as found on pages from 697 to 718, inclusive, of 6th Wallace Supreme Court report.

(It is agreed that the opinions of the Supreme Court of the United States, as reported in the printed volumes of the reports of the said court, may be used without producing copies of the same, so far as the same are admissible in evidence; same agreement applies to the
382 decrees, it not being admitted that said decrees are admissible in evidence.)

Counsel for defendant further offers—

No. 185, the decrees of the circuit court of the United States, district of Louisiana, rendered in said cause in pursuance of said decree. (To be furnished.)

Also, No. 186, opinion & decree of the Supreme Court of the United States, from page 556 to 617, inclusive, as found in 24th Howard, United States reports.

Also, No. 187, the original of the will of Daniel Clark, dated 20th May 811, with the writings on the envelope.

A. J. VILLERÉ, d'y clerk, says:

The writing on the envelope of the will, which is in the words
383 following: "Clark, Daniel, filed 13 August, 1813, & Daniel Clark, filed 17 August, 1813," has, in my opinion, been placed on this envelope prior to 1846. This writing on said envelope appears to be in a different handwriting than that to be found on the sheet of paper upon which the original will is written, said writing on the said sheet of paper being in the following words & figures, to wit: "Recorded fol. 63, vol. 2d." The figure 2 and the small D following it appears to have been overcharged.

Document marked "B. W.," being the certificate of F. B. Vinot, deputy clerk of the United States circuit court. Filed in evidence, under No. 165, Sept. 26th, 1871.

Circuit court of the United States, fifth circuit, & district of Louisiana.

CLERK'S OFFICE.

384 I certify the following to be a true copy of the original receipt entered in the receipt-book of this office:

Received from the clerk—

(2715.) Probate record filed 22 May, 1857, by compl't;

(2734.) Ledger produced by S'l Relf, & offered in evidence by compl't Oct. 31, 1857;

(2734.) Day-book produced by S'l Relf, and offered in evidence by compl't 31 Oct, 1857.

N. O., April 15, 1867.

(Signed) H. D. STONE,
Atty. for Compl't.

And I further certify that there is no other receipt in the said receipt-book relative to the foregoing numbered cases.

Witness my hand and seal of said court at New Orleans this 20th day of September, 1871.

(Signed) F. B. VINOT,
D'y Clerk.

Will of Daniel Clark, dated 20th May, 1811, offered in evidence under No. 187, September 25th 1871.

385 Ne varietur.

J. PITOT, *Judge.*

In the name of God, amen: I, Daniel Clark, of New Orleans, do make this my last will & testament—

Imprimis. I order that all my just debts be paid.

Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which I may die possessed of.

Third. I hereby nominate and appoint my friends Richard Relf & Beverley Chew my executors, with power to settle everything relating to my estate.

New Orleans, 20 May, 1811.

(Signed) DANIEL CLARK.

Ne varietur.

J. PITOT, *Judge.*

(Endorsed on back of foregoing will:)

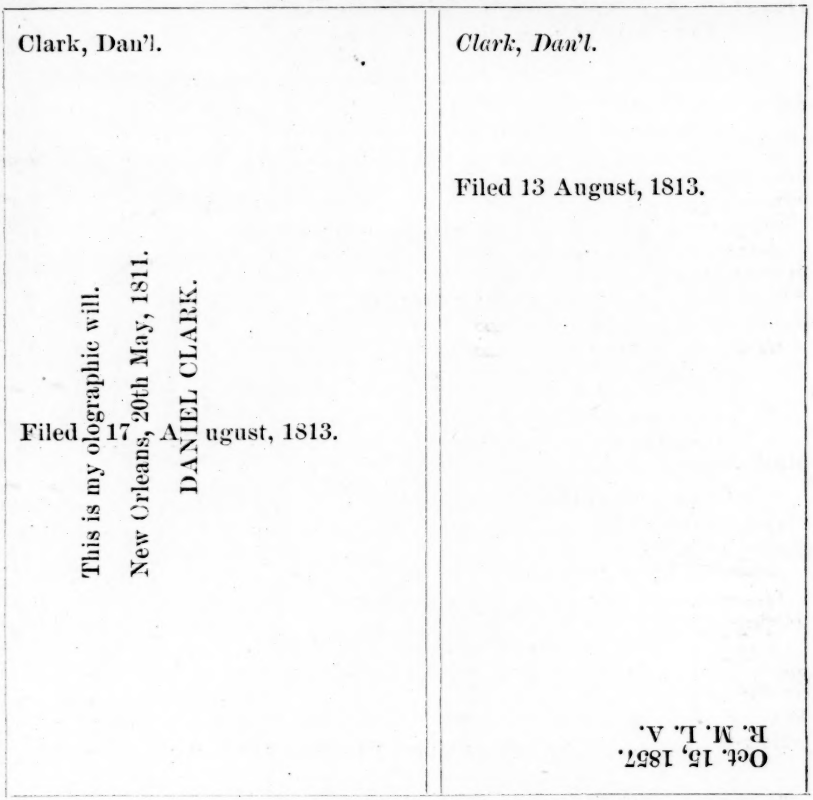
Last will of the late Daniel Clark. Filed August 17th, 1813.

Copy served same day, 23d, to Mr. R. Relf.

" " 23d.

Ditto " " 9ber, 8th, to Mr. Porter.

386 *Envelope containing said will.*



Order, case continued as entered in the minutes of September 26th, 1871.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

JOS. FUENTES & ALS. *vs.* MYRA CLARK GAINES. } No. 32979.

387 This case came up as per continuance. Present: M. Taylor & J. McConnell for plffs.; Fellows & Mills for defendant. When, after further evidence heard, the matter is continued until to-morrow at eleven o'clock a. m.

Note of evidence taken in open court & filed September 27th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

A. J. VILLERÉ recalled:

Cross-examined by counsel for plffs., says:

Question. Please examine the will itself, and state what endorsement you find thereon as to the date of the filing.

Answer. I find the following endorsements: "Last will of the late Daniel Clark, filed August 17, 1813," & further:

"Copy served same day, 23d, to Mr. Relf.
" " " 23d.
1 ditta " " 9 bre 8th, to Mr. Porter."

388 And there again, "Recorded fol. 63, vol. 2." I see no other endorsements but the above.

Question. Since the adjournment of the court on yesterday, have you not spent some time in examining with care the papers of record in the office, to ascertain the time, date of the filing of the will of Daniel Clarke of 1811? and, if so, state what date that filing appears to be.

Answer. I have referred to the original volume referred to in the endorsement on the will, and at the page indicated, that is, page 63, the will of Daniel Clark is recorded, but the date of the filing of the will & the date of its registration are not mentioned.

Question. From your examination of the papers, what is your opinion as to the date of the filing of the will?

Answer. I think that the will was filed on the 17th, because it
389 is so indicated in the endorsement on the will, and that the writing of said endorsement bears a resemblance with that placed on the other original wills of that year, now of record in this court.

Exam.-in-chief:

Question. Do you find on the will itself the certificate of its filing, signed by judge or clerk?

Answer. That certificate is not signed by any one.

Question. In that respect is not the filing on the will itself the same as the filings on the envelope to the will?

Answer. They are, with that exception, that the writing appears to me to have been placed at different times, and that the endorsements on the envelope seems to me to have been placed thereon by either Mr. Wm. F. C. Duplessis or by Mr. André D. Doriocourt, whose handwritings are pretty much the same. Mr. Duplessis is dead. Mr. Doriocourt is living.

390 Recross-examination:

Mr. Duplessis & Mr. Doriocourt were officers of this court prior to 1846. I do not believe that either of these two gentlemen were old enough to have made the endorsements referred to in 1813.

Examination-in-chief resumed:

Question. Have you any other reason than that stated to suppose that the endorsements on the envelope of the will, of date of 13 Aug., 1813, was placed there subsequent to that date?

Answer. Yes; because these endorsements on this envelope do not resemble any endorsements on the other will of that year. The handwriting is altogether different. The writing of the endorsements on the envelope is heavy, all in the same handwriting; the name of the testator written in large & heavy marked letters, whilst the endorsements on all the other wills of the same year are written in a
391 comparatively small handwriting, and altogether different. These endorsements on the envelope resembles the endorsements which are to be seen on the records of this court of a later date.

Counsel for defendant now offers in evidence, on plea of res judicata & prescription—

No. 188, the bill of complaint of Myra Clark Gaines vs. F. D. Dela-

croix & als., on page 1 to 5, inclusive, of Delacroix printed record, with the Exhibit A annexed, found in said printed record, page' 5 to 8, inclusive.

Also, No. 189, subpœna & return thereon, on pages 8 & 9 of said Delacroix printed record.

Also, No. 190, answer of F. D. Delacroix, on pages 13 to 52, inclusive, of said Delacroix printed record.

392 Also, No. 191, bill of revivor & supplement, on page 54 to 56, inclusive, of said Delacroix printed record.

Also, No. 192, subpœna & alias subpœna with return of the marshall thereon, on pages 56 & 57 of said Delacroix printed record.

Also, No. 193, answer of Delacroix to bill of revivor, on page 58 to 63, inclusive, of said Delacroix printed record.

Also, No. 194, petition for appeal, order allowing appeal, on pages 93 & 94 of *of* the Delacroix printed record.

Also, No. 195, appeal-bond & surety of justification to be found in the said Delacroix printed record on pages 94 & 95.

Also, No. 196, judgment of the Supreme Court of the United States in said cause as found in the 6th volume of Wallace United States Supreme Court Reports, on pages 719 to 723, inclusive.

393 Also, No. 197, opinions & decrees of the circuit court of the United States for the district of Louisiana, rendered in conformity to the said decree of the United States Supreme Court.

Now, on the general issue counsel for deft. offers in evidence:

No. 198, testimony of F. F. Axon, taken before J. W. Gurley, United States commissioner, as found in the New Orleans printed record, vol. 1, page 176.

Also, No. 199, certificate of the deputy clerk of the supreme court of the State of Louisiana, now filed and marked G. W.

Also, No. 200, two certificates, one signed by Antonio Argoti Villalobas, found on page 243, and the other one signed by Eugene Lassere, found on pages 243 & 244 of the New Orleans printed record, vol. 2.

394 *Rebutting evidence offered by plaintiffs.*

Counsel for plaintiffs offers:

No. 201, testimony of Isidore H. Quimper, in New Orleans printed record, vol. 2, pages 390 & 391.

Also, No. 202, testimony of Adele F. Bournos, in printed record No. 122, pages 585 to 587, inclusive.

Also, No. 203, testimony of L. F. Caire, in printed record No. 122, at page 695.

Also, No. 204, the opinion and decree of the Supreme Court of the United States in the suit No. 122 of Gaines vs. Relf & als., as found reported in 12 vol. of Howard's Reports.

Also, No. 205, the petition of appeal by the city of New Orleans from the decision of Justice Bradley in the circuit court of the United States, suit No. 2695, entitled Myra Clark Gaines vs. The City of New Orleans & als.

395 Also, No. 206, the bond given for said appeal and the order of court granting said appeal.

(Copies to be furnished.)

Also, No. 207, statement of letters on the files of the Department of States written by Daniel Clark, shewing to whom address', from what place, the month, the day of the month, & year; the certificate of

John M. Clayton, Secretary of State, as found in printed vol. No. 122, pages 867 to 869, inclusive.

Also, No. 208, the records of cumulated cases in the 5th district court of New Orleans, State of Louisiana, entitled Wm. Despaux vs. Marie Sophia Carière Despaux, No. 561, Sophia C. Despaux vs. Wm. Despaux, No. 966, Wm. Despaux vs. Sophia Carrière, his wife, No. 987, as found in New Orleans printed record, vol. 2, pages 560 to 571, inclusive.

396 Also, No. 209, proceedings for respit' with schedule of property & debts & proceedings of the meeting of the creditors, as found in printed New Orleans Record, vol. 2, pages 621 to 634, inclusive.

Also, No. 210, agreement between Daniel Clark & D. W. Cox, dated 18th of April, 1807, as found in vol. 2, New Orleans printed record, on pages 435 & 436.

Also, No. 211, between Daniel Clark, as att'y in fact of Chew & Relf, with D. W. Cox, dated 11th July, 1811, as found in the New Orleans printed record, vol. 2, on pages 620 to 621.

Also, No. 212, agreement between Daniel Clark & D. W. Cox, dated 12th July, 1811, as found in the New Orleans printed record, vol. 2, on pages 426 to 430, inclusive.

397 Also, No. 213, private explanatory agreement between Daniel Clark & D. W. Cox, dated 11th July, 1811, as found in New Orleans printed record, vol. 2, on page 610.

Also, No. 214, agreement between Daniel Clark, Beverly Chew, & Richard Relf, dated 19th June, 1813, as found in vol. 2 of the printed New Orleans Record, pages 700, 701, & 702.

Also, No. 215, admission as to the signature of Mary Clark to power of att'y from her to Relf & Chew, as found in the New Orleans printed record, vol. 1, page 202.

Also, No. 216, act of sale from Maria Carrière, wife of Jerome Desgrange, to Lefeoster, dated 3rd November, 18[0]11, as found in vol. 2 of the New Orleans printed record, pages 657 to 650, inclusive.

Also, No. 217, the memorandum of the offer by complainant, before U. S. Commissioner Lusher, of the signature of Marie Zulime Car-

398 rière Desgrange, to the ecclesiastic record of 1802, No. 141, in evidence as found on page 202 of the New Orleans printed record, vol. 1.

Re-rebutting evidence offered by counsel for defendant as to the signature of Clerk to the agreement of Clark, Chew, & Relf, dated 19th June, 1813.

Counsel offers:

No. 218, the same testimony which was offered heretofore by defendant as to signatures of John Douglas, Manouvrier, Child, Hammond, Gunt, & Smith, to be found on page 208 to 228, inclusive, of New Orleans printed record, vol. 1.

Re-rebutting evidence offered by counsel for plaintiffs.

No. 219, testimony of G. B. Duncan as found in the New Orleans printed record, vol. 1, page 865 to 874, inclusive.

399 No. 220, testimony of H. W. Palfrey, page 874 to 883, of same record & same volume.

Also, No. 221, testimony of H. P. Caire in same record & same volume, on page 883 to 887, inclusive.

Also, No. 222, testimony of Theodore Guyol, in same volume & same record, at pages 887 to 889, inclusive.

Evidence closed.

Order, case continued as entered in the minutes of September 27th, 1871.

JOSEPH FUENTES & ALS.,
vs.
MYRA C. GAINES. } No. 32979.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

This case came up as per continuance—present, M. Taylor & J. McConnell for plffs.; Fellows & Mills for defendant—when, after hearing further evidence, the matter is continued to Friday next, the 29th instant, at eleven o'clock a. m.

400 *Document G. W., being certificate of d'y clerk of supreme court of Louisiana, offered in evidence by defendant, under No.* 199, *September 27th*, 1871.

Supreme court of the State of La.

CLERK'S OFFICE,
New Orleans, September 27th, 1871.

EXTRACT FROM THE MINUTES.

TUESDAY, *November 27th*, 1855.

The court met—

Present, their honors, E. T. Merrick, chief justice; Cornelius Voorhies, A. M. Buchanan, Hy. M. Spofford, & J. A. Lea, associate justices.

Succession of Daniel Clark.

On the application of Mrs. Myra Clark Gaines.

MRS. MYRA GAINES, APPLT.,
ABSENT HEIRS OF DL. CLARK, APPE'ES. }

This cause was this day argued by Smiley & Bonford, esqrs., of counsel for Mrs. Gaines, appellant, & Greer B. Duncan, esq., of counsel for Richard Relf, executor.

401 I hereby certify the foregoing to be a true and faithful extract from the minutes of the date aforesaid, (minute-book 12, p. 259.)

In testimony whereof I have hereunto set my hand and affixed the seal of this hon. court on this the day, month, & year first above written.

(Signed) E. P. JULIAN,
Depy. Clerk.

Copy of decree of the United States circuit court, in the suit of Myra Clark Gaines vs. The City of New Orleans & al., No. 2695 *of said court, offered in evidence on behalf of defendant, under No.* 175, *September 26th*, 1871.

United States circuit court, fifth circuit, & district of Louisiana, April term, 1870.

NEW ORLEANS, *Thursday, June 9th*, 1870.

Court met pursuant to adjournment.

402 Present, his honor J. P. Bradley, associate justice of the Supreme Court, presiding:

Present, his honor W. B. Woods, circuit judge.

MYRA CLARK GAINES
vs.
THE CITY OF NEW ORLEANS & AL. } No. 2695.

In obedience to the mandate of the Supreme Court of the United States, filed in this court, reversing the decree of this court made in this cause on the nineteenth day of April, A. D. one thousand eight hundred and fifty-eight, and commanding this court to proceed therein in conformity to the opinion of said Supreme Court accompanying said mandate. For reasons assigned, it is now hereby adjudged and decreed, upon the evidence in this cause, that Myra Clark Gaines, complainant in the same, is the only legitimate child of Daniel Clark, in the said bill and proceedings
403 mentioned, and, as such, was exclusively invested with the character of such legitimate child, and entitled to all the rights of the same, and that under and by virtue of the last will and testament of Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and, as such, entitled to all the estate, whether real or personal, of which he, the said Daniel Clark, died possessed, subject only to the payment of certain legacies therein named.

And this court doth further order, adjudge, and decree that all property described and claimed by the defendant, Ernest H. Lameyer, in his answer and exhibits thereto annexed, to wit, the certain lot of ground at the corner of Toulouse & Burgundy streets, being the north corner of said streets, and measuring 120 feet front on Toulouse street by 120 feet deep and front on Burgundy street, French measure, and comprised
404 within the square bounded by Burgundy, Toulouse, Rampart, & St. Peter streets, is part and parcel of the property comprising the succession of the said Daniel Clark, to wit, the same which Richard Relf and Beverly Chew, under pretended authority of testamentary executors of said Daniel Clark, and of attorneys in fact of Mary Clark, by act of sale dated December 29th, 1820, conveyed to Etienne DeBow, which the said Etienne DeBow, by act of sale of the 7th of January, 1824, conveyed to L. and M. Commagère, and which the said L. and M. Commagère, by act of the 18th of April, 1827, conveyed to Charles René Gatien Oger, and which the said Charles René Gaiten Oger, by act of sale of the 20th of May, 1833, conveyed to François Hypolite Petitpain, and which the said François Hypolite Petitpain, by act of sale of the 30th of September, 1836, conveyed to the said E. Henry Lameyer,
405 one of the defendants in this cause; that the said Richard Relf & Beverly Chew, at the time and times when, under the pretended authority aforesaid, they sold the property so described and claimed by the defendant, the said Lameyer, and when they executed their act of sale aforesaid of the 29th of December, 1820, to the said Etienne DeBow, had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale to Etienne DeBow was wholly unauthorized and illegal and is utterly null and void; and that the defendant Lameyer, at the time when he purchased the property so described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the actings and doings of the said Beverly Chew and Richard Relf in the premises illegal, null,
406 and void; and that he, the said Lameyer, ought to be deemed and held, and is hereby deemed and held, to have purchased the property in question with full notice that the sale under the pretended authority of the said Richard Relf and Beverly Chew, and their said act of sale to Etienne DeBow, were illegal, null, and void, and in fraud of

the rights of the person or persons entitled to the succession of the said Daniel Clark.

And this court doth further order, adjudge, and decree that all the property held by the defendant Lameyer, as aforesaid, now remains unclaimed and undisposed of as part and parcel of the succession of the said Daniel Clark, notwithstanding said sale in the pretended right and under the pretended authority of the said Richard Relf and Beverly Chew, and the court further order, and adjudge, and decree that
407 the complainant Myra Clark, as the legitimate and only child of the said Daniel Clark, and universal legatee under his last will and testament, is justly and lawfully entitled to the property aforesaid, so claimed and held by the defendant Lameyer, together with all the yearly rents and profits accruing from the same, since the same came into the said defendant's possession, to wit, on the 30th of September, 1836, and for which the said defendant is hereby adjudged, ordered, and decreed to account to the said Myra Clark Gaines.

And the court doth further order, adjudge, & decree that the defendant Lameyer do forthwith surrender all the said property so claimed and held by him as aforesaid, into the hands of the said Myra Clark Gaines, as a part of the succession of the said Daniel Clark. And the court further orders that an account be taken by John M. Weller,
408 master in chancery of this court, of the yearly rents and profits accrued or accruing from the said property since the 36 of September, 1836, when it came into the possession of the defendant Lameyer, and that he report the same to this court; the same account to be taken subject to the laws of Louisiana. It is further ordered that the complainant have leave to apply for such further order, direction, or decree as may be necessary.

Decree rendered June 9th, 1870.

Decree signed June 14th, 1870.

(Signed) W. B. WOODS, *Judge.*

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand & seal of said court, at New Orleans, this 26th day of December, 1870.

(Signed) F. B. VINOT, *D'y Clerk.*

409 *Copy of decree of United States circuit court, in the suit of Myra Clark Gaines vs. Manuel J. de Lizardi & al., No. 2734 of said court, offered in evidence on behalf of defendant, under No. 185, September 26th, 1871.*

United States circuit court, fifth circuit, & district of Louisiana, April term, 1870.

NEW ORLEANS, *Saturday, June* 11, 1870.

Court met pursuant to adjournment.

Present, Hon. J. P. Bradley, associate justice of the Supreme Court, presiding.

Present, Hon. W. B. Woods, circuit judge.

MYRA CLARK GAINES
vs.
MANUEL J. LIZARDI & AL. } 2734.

In obedience to the mandate of the Supreme Court of the United

States, filed in this court, reversing the decree of the court rendered in this cause on the 17th day of December, A. D. 1860, and remanding
410 said cause to this court with instructions to enter decree for complainant in accordance with the opinion of the Supreme Court:

For reasons assigned it is hereby ordered, adjudged & decreed, in conformity and obedience to said mandate of the Supreme Court of the United States, upon the evidence in this cause, that Myra Clark Gaines, complainant in this cause, is the only legitimate child of Daniel Clark, in the said bill & proceedings mentioned, and as such was exclusively invested with the character of such legitimate child, and entitled to all the rights of the same, and that, under and by virtue of the last will & testament of the said Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, & as such entitled to all the estate, whether real or personal, of which he, the said Daniel Clark,
411 died possessed of, subject only to the payment of certain legacies therein named.

And this court doth further order, adjudge & decree that all the property described and claimed by the complainant, Myra Clark Gaines, in her said bill of complaint, and at the time of the filing this case in the possession of the several defendants, to wit, John Diamond, Eliza P. Sennecal (revised against Isabella Jenkins,) and John Slidell, in part and parcel of the property comprising the succession of Daniel Clark, to wit, the same which Richard Relf and Beverly Chew, under pretended authority as testamentary executors of the said Daniel Clark, and attorneys-in-fact of Mary Clark, caused to be set up and sold at public auction on the 19th day of December, A. D. 1820, and which was subsequently acquired in the parts and parcels set forth in said bill
412 of complaint by the several defendants in this cause, to wit, John Diamond, Eliza P. Senacal (revived against Isabella Jenkins,) and John Slidell; that the said Richard Relf & Beverly Chew, at the time when, under the pretended authority aforesaid, they caused the property so described and claimed by the said complainant, and held respectively by the several defendants, to be set up and sold at auction on the 19th day of December, A. D. 1820, had no legal right or authority whatever so to sell or dispose of the same, or in any manner to alienate the same; that the said sale at auction by the said Beverly Chew & Richard Relf, on the 19th day of December, A. D. 1820, was wholly unauthorized and illegal, & is utterly null and void; and that the several defendants, John Diamond, Eliza P. Senecal (revived against Isabella Jenkins,) and John Slidell, at the time when they respect-
413 ively purchased the property as described and claimed as aforesaid, were bound to take notice of the circumstances which rendered the actings and doings of the said Richard Relf and Beverly Chew in the premises illegal, null and void, and that they, the said defendants, ought to be decreed and held to have purchased the property in question with full notice that the said sale at auction by the said Beverly Chew and Richard Relf, on the 19th day of December, 1820, under their pretended authority, was unauthorized and illegal and null and void, and in derogation and fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And the court doth further order, adjudge, & decree, that all the property claimed and described by the said complainant, Myra Clark
414 Gaines, in said bill of complaint as aforesaid, and at the filing of this cause in the possession of the said defendants, to wit, John Diamond, Eliza P. Senecal, (revived against Isabella Jenkins,) and John Slidell, now remains unclaimed and undisposed of as a part and parcel

of the succession of the said Daniel Clark, notwithstanding such sale at auction on the pretended right or under the pretended authority of the said Richard Relf and Beverly Chew.

And this court doth further order, adjudge, and decree, that the complainant, Myra Clark Gaines, as the legitimate and only child of the said Daniel Clark, and universal legatee under his last will and testament, is justly and lawfully entitled to all the property aforesaid, so claimed and described in the said bill of complaint & held by the said respective defendants, together with all the yearly rents and
415 profits accrued and accruing from the same since the same came into the possession of said defendants, and for which the said defendants are hereby adjudged, ordered, and decreed to account to the said Myra Clark Gaines.

And whereas the defendants, John Diamond, Elysa P. Senecal, (revived against Isabella Jenkins,) and John Slidell, admit in their answers and exhibits thereto annexed that they have now in their possession certain lots of grounds and improvements thereon, claimed by the complainant, and described by her in her bill of complaint, sold at public auction as aforesáid, under the pretended authority of the said Richard Relf and Beverly Chew, as testamentary executors of the said Daniel Clark, deceased, on the 19th day of December, A. D. 1820, and subsequently acquired by the said respective defendants: It is therefore
416 ordered, adjudged, and decreed, that the said defendants, John Diamond, Elysa P. Senecal, (revived against Isabella Jenkins,) and John Slidell, do forthwith surrender and deliver to the said complainant, Myra Clark Gaines, all of said lots of grounds, with the improvements thereon, claimed & described as aforesaid, and that the said defendants do respectively account to the said complainant for the yearly rents & profits of the same, so ordered to be surrendered and delivered to the said complainant.

And this court doth further order, adjudge, & decree, that an account be taken by John B. Weller, a master in chancery of this court, of the yearly rents and profits of the said lots of ground and improvements theron, held as aforesaid by the said defendants respectively, from the time when the said lots of ground came into the possession of the
417 said defendants, & report the same to this court, said account to be made according to the laws of the State of Louisiana.

And the court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, have execution against the said defendants for dollars, costs incurred in this cause in both courts, and as to certain of the defendants in this cause, to wit, Widow Raymond Massana, N. Daben, J. J. Lamoine, Elizabet*te* Menturn alias Dauphine, Aloyse Menturn, alias Dauphine, and Paul Pesquiere, who filed herein pleas to the jurisdiction of this court. It is ordered, adjudged, and decreed that the said pleas be overruled, and that the said defendants, Widow Raymond Massana, N. Daben, J. J. Lamoine, Elizabet*te* Mentern, alias Dauphine, Aloyse Mentern, alias Dauphine, & Paul Pesquiere, answer to the bill of complaint.

418 And this court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, have leave to apply to the court for such further order, direction, or decree as may be now or hereafter necessary in the premises.

Decree rendered June 11th, 1870.

Decree signed June 15th, 1870.

(Signed) W. B. WOODS, *Judge.*

CLERK'S OFFICE.

A true copy from the original record in this office.
New Orleans, October 4th, 1871.
(Signed) F. B. VINOT,
D'y Clerk.

Copy of decree of United States circuit court in the suit of Myra Clark Gaines vs. M. J. de Lizardi & al., No. 2734, of the said court, offered in evidence on behalf of defendant under No. 185, September 26th, 1871.

419 United States circuit court, fifth circuit & district of Louisiana
April term, 1870.

NEW ORLEANS, *Thursday, June* 9, 1870.

Court met pursuant to adjournment. Present, his honor J. P. Bradley, associate justice of the Supreme Court, presiding. Present, his honor W. B. Woods, circuit judge.

MYRA CLARK GAINES
vs.
MANUEL J. LIZARDI & AL. } 2734.

In obedience to the mandate of the Supreme Court of the United States filed in this court, reversing the decree of this court rendered in this case on the 19th day of April, 1858, and remanding said cause to this court with instructions to enter a decree for complainant in conformity with the opinion of said Supreme Court:

For reasons assigned it is now hereby ordered, adjudged, and
420 decreed, in conformity and obedience to said mandate of the Supreme Court of the United States upon the evidence in this cause, that Myra Clark Gaines, complainant in this cause, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and as such was exclusively invested with the character of such legitimate child of Daniel Clark, and entitled to all the rights of the same, and that under and by virtue of the last will and testament of the said Daniel Clark, said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and as such is entitled to all the estate, whether real or personal, of which he the said Daniel Clark died possessed, subject only to the payment of certain legacies therein named.

And this court doth further order, adjudge, and decree that
421 all the property described and claimed by the defendant William Cripple, in his answer and exhibits thereto annexed, is part and parcel of the property comprising the succession of said Daniel Clark, viz, the same which Richard Relf and Beverly Chew, under pretended authority of testamentary executors of the said Daniel Clark and of attorneys in fact of Mary Clark by sale at public auction on the 19th of December, 1820, conveyed to Azile Larigue, a free woman of color, who afterwards conveyed the same to John Hiddleston on the 29th of February, 1836, and who conveyed the same to the Carrollton Railroad Company on the 27th May, 1838, who conveyed the same to A. Boutin, whose syndics subsequently conveyed the same to M. Gabriel on the 12th January, 1846, who subsequently conveyed the same to this defendant, William Crepple, on the 11th day of March, 1847; that the said
422 Richard Relf and Beverly Chew, at the time when under the pretended authority aforesaid they caused the property so described

of the succession of the said Daniel Clark, notwithstanding such sale at auction on the pretended right or under the pretended authority of the said Richard Relf and Beverly Chew.

And this court doth further order, adjudge, and decree, that the complainant, Myra Clark Gaines, as the legitimate and only child of the said Daniel Clark, and universal legatee under his last will and testament, is justly and lawfully entitled to all the property aforesaid, so claimed and described in the said bill of complaint & held by the said respective defendants, together with all the yearly rents and
415 profits accrued and accruing from the same since the same came into the possession of said defendants, and for which the said defendants are hereby adjudged, ordered, and decreed to account to the said Myra Clark Gaines.

And whereas the defendants, John Diamond, Elysa P. Senecal, (revived against Isabella Jenkins,) and John Slidell, admit in their answers and exhibits thereto annexed that they have now in their possession certain lots of grounds and improvements thereon, claimed by the complainant, and described by her in her bill of complaint, sold at public auction as aforesaid, under the pretended authority of the said Richard Relf and Beverly Chew, as testamentary executors of the said Daniel Clark, deceased, on the 19th day of December, A. D. 1820, and subsequently acquired by the said respective defendants: It is therefore
416 ordered, adjudged, and decreed, that the said defendants, John Diamond, Elysa P. Senecal, (revived against Isabella Jenkins,) and John Slidell, do forthwith surrender and deliver to the said complainant, Myra Clark Gaines, all of said lots of grounds, with the improvements thereon, claimed & described as aforesaid, and that the said defendants do respectively account to the said complainant for the yearly rents & profits of the same, so ordered to be surrendered and delivered to the said complainant.

And this court doth further order, adjudge, & decree, that an account be taken by John B. Weller, a master in chancery of this court, of the yearly rents and profits of the said lots of ground and improvements theron, held as aforesaid by the said defendants respectively, from the time when the said lots of ground came into the possession of the
417 said defendants, & report the same to this court, said account to be made according to the laws of the State of Louisiana.

And the court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, have execution against the said defendants for dollars, costs incurred in this cause in both courts, and as to certain of the defendants in this cause, to wit, Widow Raymond Massana, N. Daben, J. J. Lamoine, Elizabe*tte* Menturn alias Dauphine, Aloyse Menturn, alias Dauphine, and Paul Pesquiere, who filed herein pleas to the jurisdiction of this court. It is ordered, adjudged, and decreed that the said pleas be overruled, and that the said defendants, Widow Raymond Massana, N. Daben, J. J. Lamoine, Elizabe*tte* Mentern, alias Dauphine, Aloyse Mentern, alias Dauphine, & Paul Pesquiere, answer to the bill of complaint.

418 And this court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, have leave to apply to the court for such further order, direction, or decree as may be now or hereafter necessary in the premises.

Decree rendered June 11th, 1870.

Decree signed June 15th, 1870.

(Signed) W. B. WOODS, *Judge.*

CLERK'S OFFICE.

A true copy from the original record in this office.
New Orleans, October 4th, 1871.
(Signed) F. B. VINOT,
D'y Clerk.

Copy of decree of United States circuit court in the suit of Myra Clark Gaines vs. M. J. de Lizardi & al., No. 2734, of the said court, offered in evidence on behalf of defendant under No. 185, September 26th, 1871.

419 United States circuit court, fifth circuit & district of Louisiana
April term, 1870.

NEW ORLEANS, *Thursday, June* 9, 1870.

Court met pursuant to adjournment. Present, his honor J. P. Bradley, associate justice of the Supreme Court, presiding. Present, his honor W. B. Woods, circuit judge.

MYRA CLARK GAINES
vs. } 2734.
MANUEL J. LIZARDI & AL.

In obedience to the mandate of the Supreme Court of the United States filed in this court, reversing the decree of this court rendered in this case on the 19th day of April, 1858, and remanding said cause to this court with instructions to enter a decree for complainant in conformity with the opinion of said Supreme Court:

For reasons assigned it is now hereby ordered, adjudged, and
420 decreed, in conformity and obedience to said mandate of the Supreme Court of the United States upon the evidence in this cause, that Myra Clark Gaines, complainant in this cause, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and as such was exclusively invested with the character of such legitimate child of Daniel Clark, and entitled to all the rights of the same, and that under and by virtue of the last will and testament of the said Daniel Clark, said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and as such is entitled to all the estate, whether real or personal, of which he the said Daniel Clark died possessed, subject only to the payment of certain legacies therein named.

And this court doth further order, adjudge, and decree that
421 all the property described and claimed by the defendant William Cripple, in his answer and exhibits thereto annexed, is part and parcel of the property comprising the succession of said Daniel Clark, viz, the same which Richard Relf and Beverly Chew, under pretended authority of testamentary executors of the said Daniel Clark and of attorneys in fact of Mary Clark by sale at public auction on the 19th of December, 1820, conveyed to Azile Larigue, a free woman of color, who afterwards conveyed the same to John Hiddleston on the 29th of February, 1836, and who conveyed the same to the Carrollton Railroad Company on the 27th May, 1838, who conveyed the same to A. Boutin, whose syndics subsequently conveyed the same to M. Gabriel on the 12th January, 1846, who subsequently conveyed the same to this defendant, William Crepple, on the 11th day of March, 1847; that the said
422 Richard Relf and Beverly Chew, at the time when under the pretended authority aforesaid they caused the property so described

and claimed by the defendant William Crepple to be set up & sold by public auction on the 19th December, 1820, had no legal right or authority whatever to sell or dispose of the same, or in any manner to alienate the same; that the said sale at auction to the said Azele Larigue was wholly unauthorized and illegal, and is utterly null and void; and that the defendant William Crepple, at the time when he purchased the property as described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the actings and doings of the said Beverly Chew and Richard Relf in the premises illegal,
423 null, and void, and he, the said William Crepple, ought to be deemed and held, and is hereby deemed and held, to have purchased the property in question with full notice that the said sale at auction under the pretended authority of the said Richard Relf and Beverly Chew was illegal, null, and void, and in derogation and fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And the court further order, adjudge, and decree that all the property claimed and held by the defendant, William Crepple, as aforesaid, now remains unclaimed and undisposed of, as part and parcel of the succession of the said Daniel Clark, notwithstanding such sale at auction in the pretended right, or under the pretended authority, of the said Richard Relf and Beverly Chew; and the said court doth further order,
424 adjudge, and decree that the said Myra Clark Gaines, as the legitimate and only child of the said Daniel Clark, and universal legatee under his last will and testament, is justly and lawfully entitled to all the property aforesaid so claimed and held by the defendant, William Crepple, together with all the yearly rents and profits accruing from the same since the same came into possession of the said defendant, viz, on the 11th of March, 1847, and for which the said defendant is hereby adjudged, ordered, & decreed to account to the said Myra Clark Gaines; and whereas one of these defendants admits in his answer that he has now in his possession the certain lot of ground, and improvements thereon, claimed by the complainant, and described in said bill of complaint, sold at public auction as aforesaid under the pre-
425 tended authority of the said Richard Relf and Beverly Chew, as testamentary executors of Daniel Clark, deceased, on the 19th day of December, 1820, to Azele Larigue, free woman of color, and afterwards conveyed by the said Larigue to John Hiddleston, on the 29 day of February, 1836, and subsequently conveyed by the said Hiddleston to the New Orleans and Carrollton Railroad Company, on the 27th day of May, 1836, and subsequently conveyed by the said company to A. Boutin, and subsequently conveyed by the syndics of the said Boutin to M. Gabriel, on the 12th day of January, 1846, and subsequently conveyed by the said Gabriel to said defendant, William Crepple, on the 11th day of March, 1847.

It is therefore ordered, adjudged, and decreed that the said defendant, William Crepple, do forthwith surrender and deliver to the said complainant, Myra Clark Gaines, the lot and improvements now
426 in his possession, claimed by and described by complainant in said bill; and that the defendant, William Crepple, account of the said complainant for the rents and profits of such lot of ground and improvements thereon, as ordered to be surrendered and delivered by him to the said complainant.

And this court doth further order, adjudge, and decree that an account be taken by John B. Weller, master in chancery of this court, to the yearly rents and profits of the said lot of ground and improvements

thereon since the same came into the possession of the said defendant, William Crepple, and report the same to this court, said account to be made according to the laws of the State of Louisiana.

This court doth further order, adjudge, and decree that the com-
427 plainant, Myra Clark Gaines, have execution against defendant William Crepple for costs incurred in this cause in both courts.

And this court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, have leave to apply for such further order, direction, and decree as may be now or hereafter necessary in the premises.

Decree rendered June 9, 1870.

Decree signed June 14, 1870.

(Signed) W. B. WOODS, *Judge.*

CLERK'S OFFICE.

A true copy from the original record in this office.

New Orleans, October 4th, 1871.

(Signed) F. B. VINOT,
Dy Clerk.

Copy of decree of United States circuit court in the suit of Myra Clark Gaines vs. F. D. Delacroix & al., No. 2619 *of said court. Offer-*
428 *ed in evidence on behalf of defendant under No.* 185, *September 26th,* 1871.

United States circuit court, fifth circuit, & district of Louisiana, April term, 1871.

NEW ORLEANS, *Monday, June* 12, 1871.

Court met pursuant to adjournment. Present: Hon. J. P. Bradley, associate justice of the Supreme Court, presiding.

Present: Hon. W. B. Woods, circuit judge.

MYRA CLARK GAINES
vs.
F. D. DELACROIX & AL. } 2619.

In obedience to the mandate of the Supreme Court of the United States, filed in this court, reversing the decree rendered in this cause on the 19th day of April, 1858, and remanding said cause to this court, with instructions to enter a decree for complainant in conformity with the opinion of the Supreme Court:

429 It is now hereby ordered, adjudged, and decreed that Myra Clark Gaines, complainant in this cause, is the only legitimate child of Daniel Clark, in the said bill and proceedings mentioned, and, as such, was exclusively invested with the character of sole legitimate child, and entitled to all the rights of the same, and that, under and by virtue of the last will and testament of the said Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and, as such, is entitled to all the estate whatever, real or personal, of which he, the said Daniel Clark, died possessed, subject only to the payment of certain legacies therein named. And this court doth further order, adjudge, and decree that all the slaves pretended to have
430 been purchased by the original defendant, Frances Dussau Delacroix, on the 5th of October, 1813, and the 11th of December, 1813, from Richard Relf, acting under the pretended authority of testa-

mentary executor of the said Daniel Clark, and as are fully described in the said defendants' answer and the exhibits thereto annexed, were part & parcel of the property comprising the succession of the said Daniel Clark. That the said Richard Relf, at the time and times when, under the pretended authority aforesaid, he caused the property and slaves so described and claimed by the defendant, the said F. Delacroix, to be sold on the said 5th of October, 1813, and 11th of December, 1813, and when he, the said Richard Relf, executed his acts of sale of said slaves, to the said F. D. Delacroix, as set forth in the said defendants' answer and exhibits thereto annexed, had no legal right
431 or authority whatever to sell and dispose of the same, or in any manner alienate the same; that the said sales were wholly unauthorized and illegal, and are utterly worthless and void, and that the defendant, F. D. Delacroix at the time when *her* purchased said slaves described as aforesaid, was bound to take notice of the circumstances which rendered the actings and doings of the said Richard Relf in the premises illegal, null, and void; and that the said F. D. Delacroix ought to be deemed and held, and is hereby deemed and held, to have purchased the said slaves with the full notice that the said sale thereof to her, under the pretended authority of the said Richard Relf and Beverly Chew, and their acts of said sale to him was illegal, null, and void,
432 and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And this court doth further order, adjudge, and decree that the said slaves remain unclaimed and undisposed of, as part and parcel of the succession of the said Daniel Clark, notwithstanding such sales and acts of sale on the pretended right or under the pretended authority of the said Relf and Chew, and were to be accounted for as such by the said F. D. Delacroix together with all the increase, earnings, and profits thereof.

And the court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, as the legitimate and only child of Daniel Clark, and universal legatee under his last will and testament, is fully and lawfully entitled to the said slaves and their earnings and
433 profits as aforesaid, from the time they came into the possession of the said F. D. Delacroix, the original defendant, to wit, from the 5th day of October, 1813, as to the twenty-three thereof, and from the 11th day of December, 1813, as to fifty-five thereof, as alleged in the bill of complaint and admitted in said answer.

And it is hereby ordered, adjudged, and decreed that the estate and succession of the original defendant, F. D. Delacroix, through her legal representative and executor, the now defendant, Daniel Hypolite Delacroix, ought to account to the said complainant for the said slaves, their increase, earnings, & profits as aforesaid. But forasmuch as it appears by the answer of the said Hypolite Dussau Delacroix, executor as aforesaid; that the said original slaves have all died or
434 been disposed of, and that no slaves of the estate or possession of the said F. D. Delacroix have come into the hands or possession of the said Daniel Hyppolite Dussau Delacroix, except such as were born to the said F. D. Delacroix, and inasmuch as slavery hath been abolished throughout the United States, and the said Daniel Hyppolite Dussau Delacroix cannot deliver to the complainant either the said original slaves or any of their increase in propria personis—

It is therefore ordered, adjudged, and decreed that the said estate and succession of F. D. Delacroix, through the said Daniel Hyppolite, executor as aforesaid, ought in equity to account, and that the said

estate and succession, through the said Daniel Hyppolite, do account accordingly to the said complainant for the actual value of the
435 said slaves at the time they were purchased by and came into the hands and possession of the said F. D. Delacroix as aforesaid, in October and December, 1813, as aforesaid, with interest thereon from the time respectively to the time of taking the account hereinafter mentioned, at the rate of five per cent. per annum, in lieu of and as an equitable equivalent for the said slaves, their increase, earnings, and profits as aforesaid.

And it is further ordered, adjudged, & decreed that it be referred to John B. Weller, esq're, as a special master of this court, to take and state the account of said actual value of said slaves and of the said interest thereon to this court with all convenient speed.

This court doth further order, adjudge, and decree that the
436 complainant, Myra Clark Gaines, have execution against the defendant, F. D. Delacroix and his executor, by bill of revivor, the said D. H. Delacroix for the costs incurred in this cause in both courts.

And this court doth further order, adjudge, and decree that the complainant, Myra Clark Gaines, have leave to apply for such further order, direction, and decree as may be now or hereafter necessary in the premises.

Decree rendered June 12th, 1871.

Decree signed June 13, 1871.

(Signed) J. P. BRADL'Y,
Associate Justice Sp. Ct. U. S.

CLERK'S OFFICE.

A true copy from the original record in this office.
N. O., October 4th, 1871.

(Signed) F. B. VINOT,
D'y Clerk.

437 *Order.—Case continued, as entered in the minutes of Sept. 29th, '71.*

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES.

This case came up this day for argument—M. Taylor & J. McConnell, for plffs., Fellows & Mills for defendant—when the court, after hearing Mr. Taylor in his opening arguments, ordered the matter to be continued to Wednesday next, October 4th, 1871, at eleven o'clock a. m.

Order.—Case continued, as entered in the minutes of October 4th, '71.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES.

Owing to the absence of J. McConnell, esq., of counsel herein, it is ordered that this case, fixed for this day for further argument, be continued until to-morrow at ten o'clock a. m.

438 *Order.—Case continued, as entered in the minutes of October 5th, 1871.*

Second dist. court for the parish of Orleans, Hon. T. W. Collens presiding.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

This case came up this day regularly—J. McConnell for plaintiffs, Fellows & Mills, for defendant—when, after hearing further argument of counsel, the matter is continued until to-morrow at eleven o'clock a. m.

Order.—Case continued, as entered in the minutes of Oct. 6th, 1871.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

This case came up this day regularly—present, J. McConnell for plffs., Fellows & Mills for defendant—when, after further argument heard, the matter is continued until Tuesday, October 10th, 1871, at ten o'clock a. m.

439 *Order.—Case continued as entered in the minutes of Oct. 10th, 1871.*

Second district court for the parish of Orleans, Hon. T. W. Collens, presiding.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

This case came up this day, as per continuance from the 6th instant—J. M. McConnell, for plaintiffs; Fellows & Mills, for deft—when, after hearing further argument of counsel, the matter is continued to the 11th instant, at ten o'clock a. m.

Copy of letter of Mazureau, offered in evidence on behalf of plaintiffs, under No. 55, & filed October 11th, 1871.

NEW ORLEANS, *May 1st*, 1842.

D. W. COXE, Esq.:

SIR: In the conversation with you in February last, I mentioned in reply to your enquiries that the late Daniel Clarke once con-
440 sulted me and the late Edward Livingston, esq., not "to ascertain whether he could not make some provision by will for Myra, his supposed illegitimate daughter," but whether a certain will, of which he shewed me a rough sketch, would be valid in law in this then territory. The will thus intended to be made stated Myra to be his legiti-

mate child, and instituted her his universal heir; leaving to his own mother an annual rent of, I believe, three thousand dollars. Upon asking Mr. Clarke what the name of the mother's girl was, he answered me, "You know the lady; it is Mme. Desgranges." "But that woman was married, and Desgranges was alive when the girl was born. I recollect having heard a good deal of talk about it at the time, but never heard your name mentioned as connected with that love affair." "Yes," said Clarke, "she was married, I know, and what matters it? The ruffian (who kept a confectionary shop here) had deceived that pretty woman; he
441 was married when he courted her, and became her husband, and it was reported he ran away afterwards from fear of being prosecuted. So you see this marriage was null." "That may be; but until so decreed by a competent tribunal, the marriage exists, and the child is of such a class of bastard, an adulterous bastard, as not to be capable, by our law, of receiving by will from her supposed father any thing beyond what may be necessary for her sustenance and education. Such are the positive provisions of our code. The Spanish laws were somewhat more favorable. They permitted the father to leave to such a child one-fifth of the whole of his estate, but our code has restricted that to mere alimony."

I shewed Clarke both our codes & the Spanish laws, and, though apparently disappointed, he expressed his satisfaction that he could not make the will he intended to make.

I went further, & shewed him the girl could not be legitimated, or even acknowledged as his child, by subsequent marriage or otherwise.
I showed him also that if his mother survived him she was his
442 forced heir, and that in supposing that he could leave to the child anything beyond what is necessary for her sustenance, it could not be of the value of more than one-third of his estate, as his mother was entitled to take and receive two-thirds clear of all charges or dispositions.

"What shall I do then?" asked Mr. Clark. "Sir, if you have friends in whom you can place your confidence—you probably have some—convey the' secretly some of your property, or give them money for the use of the child, to be given her by them when she becomes of age." "That I'll do," said Mr. Clarke, and we separated.

I heard afterwards from him and from Mr. Bellechasse that he, Clark, *that* done what he told me he would do.

I may add here that the first husband of Myra wanted to retain me
443 as her counsel to sustain her claim under the pretended will (which I sincerely think never was executed) was universal heir of Mr. Clarke. That I declined from the motives above expressed; and, as he confessed to me that the friends of Clarke had conveyed to her the property which he had trusted them with for her use, I advised him to be contended with what he had.

The present husband of Myra came once to ask me whether I had any knowledge of a will in favor of his lady by the late Clarke, and in that case whether I had any objection to appear as one of her witnesses. My answer to him was this: I have seen no such will of Mr. Clarke, but he has consulted me upon a will of which he shewed me a rought sketch. "Well, that will answer our purpose," said the general. "Very little, I believe, for if I was to give any testimony I am enclined to think it would
444 demolish all your pretentions." "Never mind," said the general, "I will have you subpœna'd." Upon this I stated to him all that had occurred between Clarke and myself on the subject, the opinion

I had given him, and the determination which he did say he had taken, &c., &c., and he retired, and I never was subpœna'd.

Before concluding, I must observe that, having once been of counsel for Mr. Relf in a case of libel brought by him against Myra's first husband in the Federal court, I felt a very natural delicacy, and declined to appear as a witness for him in the suit that has since made so much noise.

As this is written in haste, I would not like it to meet the eye of the public, though every particle of it is most substancially true.

I remain, with great respect, your most obedient servant,

(Signed) MAZUREAU.

United States circuit court, fifth circuit & district of Louisiana.

CLERK'S OFFICE.

445 I certify the foregoing to be a true copy of the original letter annexed to and made part of the testimony of Daniel W. Cox, taken under commission and on file in the case of E. P. Gaines & wife vs. Relf, Chew & al., number 122 on the docket of said court.

Witness my hand & seal of said court, at New Orleans, this 12th day of September, 1871.

(Signed) F. B. VINOT,
D'y Clerk.

Bill of exceptions.—Filed by defendant, October 11th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause, plaintiffs' counsel offered in evidence a certain letter purporting to have been
446 written by Mazureau to D. W. Coxe, and dated New Orleans, May 1, 1842, to the admission of which in evidence defendant's counsel objected not as containing irrelevant matter or mere opinion, but, (though containing matters of fact stated as being to the personal knowledge of the writer,) it was not admissible, because—

I. Mazureau was alive for years pending the litigation in the U. S. court, and after issue joined in that court, so that his direct testimony could have been taken.

II. He was counsel of record opposed to Myra Clark Gaines in the U. S. court.

III. The status of Mrs. Gaines cannot be enquired into in this case.

IV. The letter contains (besides the facts stated) expressions of opinion which are not evidence.

Which objections having been overruled by the court, and said
447 letter admitted in evidence, defendant's counsel except to the ruling of the court, and tender this their bill of exceptions after exhibiting the same to opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant, October 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that, on the trial of this cause, on the 26th April, 1871, plaintiffs' counsel offered in evidence—

1. A document purporting to be an agreement between Daniel Clark and D. W. Coxe, in the year 1807, as found in printed New Orleans, vol. 2, pages 435 to 436.

448 2. Document purporting to be an agreement between Daniel Clark, as agent of Chew & Relf, with D. W. Coxe, of 11 July, 1808, as found in the printed New Orleans Record, vol. 2, page 620.

3. Document purporting to be an agreement of Clarke with Coxe, 12th July, 1811, as found in New Orleans , vol. 2, pages 426, 430, and private explanatory agreement between same parties of same date, as found in said printed record, vol. 2, page 410.

4. Document purporting to be an agreement of partnership between Daniel Clark and Beverly Chew & Richard Relf, dated 19 June, 1813, as found in New Orleans printed record, vol. 2, pages 700 to 702.

To the admission of all of which in evidence defendant's counsel objected on the ground:

1°. Of the irrelevancy of said testimony to the issues involved in this cause; and—

449 2°. That the said alleged signatures of said Daniel Clark to any and all of said documents, and specially to that numbered 4, in this bill, being the alleged act between said Daniel Clark and Chew & Relf of the 19th June, 1813, have not been proved to be the genuine signatures of said Daniel Clark.

Which objections having been overruled by the court, and all and each of said documents having been admitted in evidence by the court, defendant's counsel except to said ruling, and tender this their bill of exceptions to the same, after exhibiting said bill to opposite counsel, in order that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant, October 11th, 1871.

450 Second district court for the parish of Orleans.

JOSEPH FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered, that on the trial of this cause this 10th June, 1871, counsel of plaintiffs and intervenors offered in evidence the document purporting to be a letter of Daniel Clark to his sister, dated October, 1805, as found in the New Orleans Record, vol. 2, page 527, and in connection therewith, to prove the genuine'ss of said letter, the testimony of H. Davis, and the exhibit to said testimony found on said record, volume 2, on pages 381 to 384, and also the testimony of Dr. Barnes, as found in said second volume of the said record, on pages 526 to 529, and testimony of S. Barton, on pages 953 to 954, as also the testimony

of James McConnell & A. J. Villere, to the admission of which testimony in evidence, defendant's counsel objected on the ground that said witnesses do not establish either the loss of the original
451 of said alleged letter of Daniel Clark, or that said document on said page 527 is a true copy of said original, if one ever existed, and also because said letter, if produced as original, is irrelevant and inadmissible to establish any issue of fact or law involved in this cause; that said testimony is, to a great extent, hearsay, and not responsive to the interrogatories; and also said plaintiffs' counsel offered the testimony of said witness, H. Davis, generally, and to which defendant's counsel opposed the same objections, and the further objections that so far as all and singular said testimony was introduced to question the status of defendant as the legitimate child of Daniel Clark, the same was further exceptionable on the ground set forth in defendant's plea of res judicata as to said question of status.

452 All of which objections, however, having been overruled by the court, defendant's counsel objected, and tender this their bill of exceptions, after having exhibited the same to opposite counsel, that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant, October 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. } *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered, that on the trial of this cause on the 11th September, 1871, plaintiffs' counsel offered in evidence a document purporting to be a will of Mary Clark with certificate of authenticity annexed, as found in the printed probate record on pages 73 to 74, to the admission of which in evidence defendant's counsel objected, on
453 the ground that said document is not proved or certified according to the act of Congress or the laws of the State of Louisiana, and because the same is irrelevant and incompetent.

Which objections having been overruled by the court, and said document admitted, defendant's counsel except to the ruling of the court, and tender this their bill of exceptions, after exhibiting the same to opposite counsel, that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant, October 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. } *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered, that on the trial of this cause on this 11th September, 1871, plaintiffs' counsel offered in evidence a certain document
454 purporting to be a power of attorney from Mary Clark to Relf & Chew, of Oct. 1813, and purporting to have been recognized by Thos. Sparhawk, a subscribing witness, before John Banz, mayor of the

city of Philadelphia on the 2d October, 1813, and to have been registered in the office of John Lynd, notary public for the city of New Orleans, on 22d April, 1817, as found in printed probate record on pages 71 to 73 inclusive, to the admission of which in evidence defendant's counsel objected, on the grounds that neither said original power of attorney nor copy is not certified nor authenticated according to the act of Congress for authenticating acts, or according to the laws of the State of Louisiana, and, further, because there is no evidence of the genuine'ss of the signature of said Myra Clark, and because the same is irrelevant and incompetent.

455 Which objections having been overruled by the court and said document admitted, defendant's counsel excepted to said ruling, and tender this, their bill of exceptions, after exhibiting the same to opposite counsel in order that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions filed by defendant October 11th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause, on this 11th September, 1871, plaintiffs' counsel offered in evidence a document purporting to be a "power of attorney from executors of Mary Clark to Chew & Relf," as found in printed probate record, on pages 76 to 77. To the admission of which in evidence defendant's counsel objected, on

456 the ground that the said document is not proved or certified according to the act of Congress or the laws of this State, and because the same is irrelevant and incompetent.

Which objections having been overruled by the court, and said evidence admitted, defendant's counsel excepts to said ruling, and tender this their bill of exception, after submitting the same to opposite counsel, that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions filed by defendant October 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause, on this 25th September, 1871, defendant's counsel offered in evidence the testimony

457 of Elliott Robins, in the New Orleans printed record, vol. 1, page 178, and which testimony is hereto made part of this bill; to the admission of which in evidence plaintiffs' counsel objected on the grounds—

1°. As being irrelevant.

2°. Because his statements as to the contents of written documents or signatures thereto are not the best evidence, & are incompetent.

3°. Because his statements are mere matters of opinion, & not evidence.

4°. The records & signatures referred to should be produced, they being the best evidence, and within reach of the process of the court.

And which objections having been sustained by the court, and said testimony rejected, defendant's counsel excepted to said ruling and tender this their bill of exceptions, after submitting the same to
458 opposite counsel, that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions filed by defendant October 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause, on this 27th September, 1871, plaintiffs' counsel offered in evidence the following testimony, to wit:

The statement of letters on file in Department of State, and found in the printed record known as No. 122, on pages from 867 to 869, and being No. 207 of testimony.

The then cumulated cases in the fifth district court of New Orleans, entitled Wm. Despau vs. Madam Sophia Despau, No. 561; Sophie Despau vs. Wm. Despau, No. 966, and Wm. Despau vs. Sophia Carrière, his wife, being No. 208 of evidence, and found in the New
459 Orleans printed record, vol. 2, on page 560 to 571, and proceedings of Relf & Chew for respite, with schedule of property, being No. of testimony, & found in said N. O. record, vol. 2, pages 621 to 634, and act of sale passed between Maria Carrière and , on 3' Nov., 1801, being No. of testimony, & found in said New Orleans printed record, vol. 2, pages 657 to 658.

To the admission of which testimony in evidence defendant's counsel objected to, on the ground the same are irrelevant to the issues involved in this cause; which objection having been overruled by the court, and said testimony admitted, defendant's counsel excepted, and tender this their bill of exceptions, after exhibiting the same to opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

460 *Bill of exceptions filed by defendant October 11th*, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this case this 27th September, 1871, defendant's counsel offered in evidence the testimony of C. W. Dreschler, as found in printed N. O. record, vol. 2, pages 241 & 242, to the admission of which in evidence plaintiffs' counsel objected, on the grounds, 1°. that it was not in any legal sense testimony; was but an ex-parte certificate of an individual not entitled by law to give a certificate; that he spoke of letters, documents, and of a piece cut out of a printed publication, and of the contents thereof, which was incompetent,

not being the best evidence, and the original, if produced, being res inter alias acta; and as being purely hearsay.

461 Which objections having been sustained by the court, and said testimony admitted, defendant's counsel excepted, and tender this their bill of exceptions, after exhibiting the same to opposite counsel, that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions filed by defendant October 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause plaintiffs' counsel offered in evidence the certain document purporting to be an act of copartnership, referred to and annexed to the account of Chew & Relf as an act of copartnership between Clark, Chew & Relf, to the admission of which in evidence defendant's counsel objected, on the grounds

462 that the original of said document is not proved, and the signature of Clark to said document is not shown to be genuine, and because the said instrument is irrelevant and incompetent.

Which objections having been overruled by the court, and said evidence admitted, defendant's counsel except, and tender this their bill of exception, after exhibiting the same to opposite counsel, in order that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions filed by defendant October 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause plaintiffs offered in evidence what purports to be the opposition of Caroline Barnes

463 & Sam'l S. Campbell, as found on pages 111 to 117 of printed probate record; as also joinder therein by A. Hoa, attorney of absent heirs, as found on pages 116 & 117 of said record, as also dismissal thereof by the court, as found on page 130 of said record, as also the amended bill of Gaines & husband filed Nov. 28, 1848, in suit No. 122, as found in the printed New Orleans Record, vol. 2, on pages 65 to 82.

Also, the decree and mandate of Supreme Court in said suit No. 122, as found in said printed New Orleans Record, vol. 1, page 361.

To the admission of which in evidence plaintiffs' counsel objected, on the ground that said testimony is irrelevant, between other parties; which objections having been overruled by the court, and said testimony admitted, defendant's counsel objected to said ruling, and tender

464 this their bill of exception, after exhibiting the same to opposite counsel, that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions filed by plaintiffs October 11th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES. }

Be it remembered that, during the trial of the above-entitled cause, counsel for defendant offered in evidence the following documentary proofs, testimony of witnesses, which were at the objected to by plaintiffs, as being irrelevant to the issues involved in this cause, and as ex parte, to wit:

No. 112 testimony of Elliott & Robins & exhibit.
" 113 " " John S. Baron.
" 114 " " J. W. Gurly.
" 116 " " Mrs. Blondeau.
" 117 " " A. Breyenhiedt.
" 118 " " Mrs. H. C. Nixon.
465 No. 119 testimony of Louise Raynoir.
" 120 " " S. Guinault.
" 121 " " Mrs. E. Brazier.
" 122 " " " E. Cautrelle.
" 123 " " Lizzie Carrière.
" 124 " " M. Cretien.
" 125 " " J. J. Louallier.
" 126 " " Marie C. Louallier.
" 127 " " L. Dupré.
" 128 " " C. Dupré.
" 129 " " E. Lamorandier.
" 130 " " M. Gunado.
" 131 " " Marie L. Fontenot.
" 132 " " Cedalise Thompson.
" 133 " " Theoliste Roy.
" 134 " " Z. L. Foucher.
" 135 " " M. F. Garcia.
" 136 " " Antonio Alma.
" 137 " " Maria C. F. L. Truffin.
" 138 " " André de Torras.
" 139 " " Frances Reulle.
" 140 " " Eliza L. Reulle.
" 141 " " Jno. B. Sarazin.
" 142 " " Pedro de Torre.
" 143 " " J. G. Zamora.
" 144 " " Dezere Viganaud.
" 145 " " M. L. Outlett.
" 146 " " Wm. T. Crawford.
466 No. 147. Testimony of Peter K. Wagner.
" 148. " " L. T. Beauregard.
" 149. " " Chas. Harrod.
" 150. " " Wm. Christy.

Also, No. 152, of S. Smith, or Schmidt; No. 153, of Wm. Gaunt; No. 154, of Jno. Douglas; No. 155, of J. Manouvrier; No. 156, of J. B. Child; No. 157, J. T. Hammond; No. 158, certificate of Lusher, with memorandum of exhibits; 159, James. Foulhouse; No. 165, certificate of F. B.

Vinot; No. 166, testimony of H. Gaunt; No. 167, bill of complaint in suit of city No. 2695, and Nos. 168, subpœna therein; Nos. 169 to 174, inclusive, being portions of the record of said suit 2695 & of other records; also Nos. 175 to 186, inclusive, being detached portions of certain records 2695 & others; also Nos. 188 to 197, inclusive, being portions of records, having no relevancy to this cause; No. 199, being certificate of clerk supreme court of Louisiana, marked "G. W.;" No. 200,
467 being certificates of Villabolas & E. Lassere; and No. 218, being the same testimony which was offered heretofore by defendant as to signatures of J. Douglas, Manouvrier, Childs, Hammond, Gaunt, & Smith.

The said numbers prefixed to each item of evidence being taken from the clerk's note of evidence offered by defendant, wherein reference is made to the pages in the printed volumes where said evidence is to be found.

But the court overruled the objections made by plaintiffs to said evidence, that the same was each and all irrelevant to the issues involved in this cause and was ex parte, and admitted the same, and therefore plaintiff' tendered this their bill of exception to the ruling of the court, & prayed the same be signed & made part of the record herein.

(Signed) T. WHARTON COLLENS, *Judge.*

468 *Bill of exceptions filed by plaintiffs October 11th*, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. } *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that. on the 21st Sept., 1871, during the trial of the above cause, the said plaintiffs, by their counsel, under a protest & reservation of all legal rights, filed in writing their motion to exclude upon grounds therein stated certain depositions & evidence which were marked as having been filed on the 15th & 16th February, 1858, in the ex-parte proceedings for probate of the will now attacked, not waiving their right to claim that said evidence was not legally before this court in the present cause until actually offered in evidence in this cause, No. 32979, by the defendant herein.

469 Which said motion to exclude, filed herein 21st September, 1871, & marked "A," is referred to as a part hereof, as if now fully set forth; but the court, having considered the said motion to exclude & the grounds therefor, ruled as follows, to wit: That the objections to the statements of the witnesses of the declarations of Pitot are overruled by the court; & considering that Pitot died before the litigation commenced, and the length of time which has elapsed, these statements are admitted as corroborative circumstances supporting the direct testimony of witnesses who testified from their personal knowledge to the existence of the will from having seen it, but not from having effect by itself to prove a will or its contents. The court excludes as evidence in the case at bar that portion of the deposition of D. Bellechasse as contained in his answer to the 7th interrogatory, to be found in
470 printed probate record, at page 159, being the last twelve lines of said answer.

The court excludes as evidence in said cause the following portion of the answer of Boisfontaine to the 4th interrogatory, on page 149 of the

printed prebate record, to wit: "Lubin told me that when Mr. Relf went down with the keys from the armoir he followed; saw him then, on getting down, going to the office-room; and that Mr. Relf, in going into the office-room, locked the office-room doors."

The court also ruled that it excluded all the testimony of both parties of the following character, to wit: hearsay declarations, statements of conversations of third parties, statements as to contents of letters, records, & suits, and other written matter, of which said statements are not the best evidence.

471 The court also excluded all statements relative to the arrest, prosecution, and condemnation of Desgrange for bigamy, but the court receives proof of the confession of Desgrange as to his committing bigamy & the general rumors.

And thereupon to the ruling of the court in the premises, in not sustaining the objections as made in the said written motion to exclude and in receiving as evidence any portion whatever of the testimony of the said witnesses, J. D. D. Bellechasse, Mrs. Henriette Smythe, P. Baron Boisfontaine, the said plaintiffs, by their counsel, objected, and tendered this their bill of exceptions, which is accordingly signed by the judge and made part of the record.

(Signed) T. WHARTON COLLINS, *Judge.*

Bill of exceptions filed by plaintiffs October 11th, 1871.

472 Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA CLARK GAINES. } No. 32979.

Be it remembered that during the trial of the above-entitled cause defendant's counsel offered in evidence the deposition of G. Preval, as found in the printed probate record, page 8, and thereupon plaintiffs objected to the following portions thereof, to wit:

"Witness was not present when Clark died, but was there a few minutes after his death." * * * "Previously to the affixing of the seals upon the armoir, desk, &c., witness searched everywhere for his last will, which he had been informed before his death was put in a little black trunk in his bed-room. Witness therefore looked with particular attention & care in a little black trunk, and did not find the last will in it. Witness got this information from Mr. James Pitot, the old
473 parish judge at the time. After looking *at* that trunk & not finding it, witness looked in the desk and the armoir, & could not find any last will." * * * "At the moment of closing the procès-verbal Mr. Richard Relf came to witness and presented him with a paper, which he said was the last will of Daniel Clark."

Upon the ground, 1°, that the said statements were intended to vary and contradict, and did have the affect of contradicting, the procès-verbal of affixing the seals," made by said witness in his official capacity as justice of the peace, on the 16th of August, 1813, already introduced in evidence. That said procès-verbal was a part of the judicial record of the succession of Daniel Clark, and could not be varied or contradicted or the force of its expressions changed by the witness; 2°, because said statements were hearsay, & matter of opinion of the witness
474 merely.

But the court overruled these objections, & admitted the said

testimony, and thereupon plaintiffs excepted to the ruling of the court, and tendered this their bill of exceptions, which is signed by the judge & made part of the record.

Note by the judge.

I overruled the objections because—

1°. In my opinion the contradiction between the procès-verbal, and the testimony does not exist; the difference, if any, is not material, and it is easy to reconcile the testimony with the procès-verbal.

2°. The only matter which may be considered as hearsay is not stated as being in itself a fact, but only as the inducement for making the search.

(Signed) T. WHARTON COLLENS, *Judge.*

475 *Bill of exceptions filed by plaintiffs October 11th, 1871.*

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that during the trial of said cause defendant offered, No. 151, testimony of Mme. Louise V. Benguerelle, on pages 782 to 786 N. O. R., vol. 1, part of which was excluded as shown by the note of evidence.

Plaintiffs specially excepted to the reception in evidence of the answers of said witness to the last sentence of the 6th interrogatory, to the whole of the 7th interrogatory, and to the last sentence of the answer to the general cross-interrogatory, upon the ground that said statements of the witness were hearsay, were mere matter of opinion or belef, unsupported by any statement of facts or information in sup-
476 port thereof as to how she derived such belief. That the admissions or confessions of Desgranges of his having committed bigamy are incompetent evidence and inadmissible against these plaintiffs as between him and them—no party whatever exists, they asserting no claim or right under him; also for the reasons assigned by the Supreme Court of the United States, as reported in the 12th volume of Howard's Reports, page , in the the case No. 122 of Gaines vs. Relf & al.

The court having overruled the foregoing objections, and admitted said portions of the testimony of said witnesses, plaintiffs tendered this their bill of exceptions to the ruling of the court, which is accordingly signed by the judge and made part of the record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions filed by plaintiffs October 11th, 1871.

Second district court for the parish of Orleans.

477 JOS. FUENTES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that, during the trial of the above cause, on 22d September, 1871, defendant's counsel offered in evidence, No. 115, being depositions of Ellen Guerian, John Power, Mrs. E. Benson, taken at

New York May 9th, 1846, with Exhibit A thereto annexed, being latin certificate of marriage of J. Desgrange & Barbara M. Orsé, July 6, 1890, dated New York 11th September, 1806, and signed Guiliamus O'Brien, pastor, &c., and by Rey in endorsement, admitted as proved to be found in vol. 2, N. O. R., p. 260, 273; to which plaintiffs objected that it was not taken under commission issued in this or any other case, nor was it taken contradictorily with defendants, who have had no opportu-
478 nity of cross examination; that it was not taken under the act of Congress, now in compliance with its provisions, nor in compliance with the rules governing the practice of the United States courts in equity cases; that being taken de bene esse, there has been no effort or attempt made by complainant to take the testimony of said witneses contradictorily with defendant', or any of them, since issue joined, or at any other time; further objected that the statements of said witnesses are irrelevant, and not the best evidence when they spoke of the contents of any written matter or documents, and further read & specified the grounds of objection to the admissibility of said testimony & certificate stated by the Supreme Court of the United States in the decision rendered in the case of Gaines vs. Relf & al., (reported in 12th
479 Howard's Reports at p.)

And thereupon the court admitted said evidence, overruling said objections, except that it excluded all hearsay declarations & conversations of third parties, statements of opinion, together with all statements of contents of letters, records, documents, or other written matter.

And to so much of the ruling of the court as admitted the said certificate A, and any portion of the testimony of the said witnesses, plaintiffs, by their counsel, excepted, and tendered this their bill of exceptions, which is signed & made part of the record.

(Signed) T. WHARTON COLLENS, *Judge.*

The letter of Mrs. Gaines to the city of New Orleans, & exhibits hereto annexed, from page 1 to 7, referred to in note of evidence, is now produced & filed, October 11th, 1871.

480 NEW ORLEANS, *Sept.* 6, 1870.

To the honorable mayor & board of administrators of the city of N. O.:

The undersigned, having obtained a final decision from the Supreme Court of the United States covering all the points of controversy between the city of New Orleans and herself, being anxious to save innocent parties from the annoyance and expense of litigation, and with a view of effecting a compromise, just alike to the city and herself, respectfully presents to your honorable body the following exhibit of property, for which the city (either as holder or guarantor) is liable, and respectfully petitions your honorable body to devise some means for the settlement of the same without further litigation.

Very respectfully,

(Signed) MYRA CLARK GAINES.

481 BLANC TRACT.

This land is situated in the precinct of Bayou St. John, comprising about one hundred and thirty-five superficial arpents, being the same conveyed to Everiste Blanc by Richard Relf and Beverly Chew, as attorneys of Mrs. Mary Clark, by an act passed before P. Pedesclaux, notary, on

the 30th October, 1821, and by the said Blanc to the city of New Orleans on the 13th of September, 1834, by act passed before F. de Armas, notary.

I estimate the value of this property, by average of actual sales made by the city in 1837—

Fifty-one squares, at the rate of those sold	$875,568 00
Interest on the same to July 1, 1870, thirty-five years two hundred and ninety-one days, at five per cent. per annum	$1,567,161 32
482 The improvements on the above property consist of ninety-nine buildings of various sizes and value, and have been appraised separately by a disinterested party, amounting in the aggregate to	$297,000 00
The annual rents are computed at ten per cent. of the estimated value of the improvement, and twenty years, it is considered, is the average time they have been occupied	$594,000 00
Interest on the annual rents, $29,700, at five per cent. for 19 years	$282,150 00

(Squares 33, 34, & 42 excepted.)

FAUBOURG ST. JOHN PROPERTY.

The city is chargeable for the following properties in Faubourg St. John, belonging to Mrs. Gaines, viz:

Lots Nos. 1, 2, & one-half of 9, in square 7, transferred to the city by Gasper Didier, before P. E. Theard, notary public, June 30, 1854	$3,500 00
483 Rents of same, sixteen years, estimated at five per cent. on value	$2,800 00
Lots 1 to 12, in square 8, transferred to the city by Charles Windham, before P. E. Theard, notary public, Nov. 2, 1854	14,400 00
Rents of same, sixteen years, estimated at five per cent. on value	11,520 00
(The above per plan of Lafon, of 1809.)	
Lots 5, 6 & 7, on Esplanade street, per plan of A. L. Phelps, transferred to the city by A. Pitot, jr., before P. E. Theard, not. pub., Feb. 26, 1855	3,600 00
Rent of same, fifteen years, estimated at five per cent. on value	2,700 00
That portion of ground claimed by widow Mathe, through which Esplanade street is opened, conveyed by her to the city, per act, before J. Cuvellier, not. pub., Sept. 1, 1836	10,000 00
Rent of same, twenty-four years, estimated at five per cent. on value	12,000 00
That portion of ground conveyed to the city by M. D. Demorily, lying on Esplanade street, by act before J. Cuvellier, not. pub., Aug. 31, 1836	10,000 00
484 Rent of same, twenty-four years, estimated at five per cent. on value	12,000 00
Square 24, (Lafon's plan,) conveyed to the city by A. Chiapella and A. Dromillard, per act before E. G. Gottschalk, not. pub., March 9, 1854	15,000 00

Rent of same, sixteen years, estimated at five per cent. on value	12,000 00
1 to 447 feet on Broad street, per plan of , conveyed to the city by Francis Donbière, per act before P. E. Theard, not. pub., January 17, 1854	16,800 00
Rent of same, sixteen years, estimated at five per cent. on value	13,640 00
Lots 13 & 14, per plan in second district court, conveyed to the city by Augustine Bird, per act, before P. E. Theard, not. pub., Nov. 10th, 1854	2,400 00
Rents of same, sixteen years, estimated at five per cent. on value	1,920 00
Square 26, (Lafon's plan,) fifteen lots in square 17, twenty-one lots in square 14, and two lots in square 8, sold illegally at the instance of the city for paving	60,000 00
Place Le Breton & market, school-house and baker's, near the junction of Gentilly & Bayou St. John 485 road, conveyed to the city by Miles Judson, by act before A. Mazureau, notary public, Aug. 30, 1832	$25,000 00
Annual rent of market-house on Place Le Breton, from 1857 to 1870, at $1,200	15,600 00
Interest on annual rents, twelve years, at five per cent.	4,880 00
Triangular lot in rear of market-house	1,000 00
Grounds taken in opening Esplanade srreet, and damage sustained by diverting travel and business from adjacent squares, as originaly laid out	150,000 00
Grounds taken in opening Ursuline street, and damage sustained by diverting travel and business from adjacent squares, as originally laid out	130,000 00
GENTILLY PROPERTY.	
Union square, Dessaix place, square No. 2,102, square No. 2,107	10,000 00
486 POYDRAS MARKET.	
This property, situated originally in the square bounded by Poydras, Circus, Perdido, and Philippi streets, measuring 191 feet on Poydras street, by a depth of 42 feet, was purchased by the city from the Carrollton Railroad Company, on the fourteenth September, 1836, per act before J. B. Marks, notary public, and is now in suit	50,000 00
Improvements thereon, consisting of a market-house	75,000 00
Annual rent of same from July 1, 1837, to July 1, 1870, at $12,000 per annum, thirty-three years	396,000 00
Interest on annual rents, thirty-two years, at five per cent	318,800 00
Total	$4,996,039 32
Less for undiscovered errors in valuations, &c	996,039 32
Balance claimed by Mrs. Gaines for her quit-claim deed.	$4,000,000 00

Titles.

BLANC TRACT.

487 Daniel Clark purchased this property from Nicholas Maria Vidal, per act before P. Pedesclaux, July 24, 1804.

FAUBOURG ST. JOHN.

Daniel Clark purchased this property from Nicholas Maria Vidal, per act before L. T. Caire, notary public, July 24, 1804; from Louis Antoine Blanc, per act before W. T. Christy, notary public, January 25, 1805; from A. Magnon, per act before said Caire, July 15, 1807, and August 22, 1809, and from J. B. Blache, per act before said Christy, July 23, 1807.

GENTILLY PROPERTY.

Daniel Clark purchased this property from J. B. Dejean, per acts before M. D'Armas, notary public, July 3 and 11, 1812, and February 24, 1813, and from R. Clark Smyth, per act before Pedesclaux, 1813.

POYDRAS MARKET.

488 Daniel Clark purchased this property from G. T. Ross, per act before P. Pedesclaux, August 20, 1807.

NEW ORLEANS, LA., *May* 16, 1870.

To the honorable mayor & board of administrators, city of New Orleans:

We, the undersigned, memorialists, residing on the "Blanc Suburb St. John," and "Gentilli" property, and holding real estate under your vendees, which is claimed by Mrs. Myra Clark Gaines, pray your honorable body to take such action, by compromise with her or otherwise, as will quiet our titles, and relieve us from further litigation; and as in duty bound will ever pray, &c.:

L. Barnett.
Felix M. Jacobs.
M. Marmonget.
Leon Delord.
E. Guichard.
G. Manchon.
Jean Jaburt.
489 Alfred Rousseau.
B. Abadie.
John Bietry.
Mrs. P. Bietry.
Antoine Shofen.
V. Larchex.
Dennis Cronan.
Wm. Moran.
Dennis Cronan, jr.
Henry Dittmann.
Aristide Carlon.
Henry Mahroff.
Severin Chauvin.
Ellen Philips.
Jos. Torregano.
Louis Dietrich.
W. Renill.
Bertran Saire.
P. Noulet.
J. A. Duvallier.
Jean Cavan.
B. Dronoviles.
Cerenna Berhel.
Widow E. Burrel.
John Hopkins.
Wm. Hunt.
Nancy Dennis.
Celeste Lacheaux.
Prre. Lanaubrieve.
Edouard Hubel.
Gerris Montegu.

C. Ravanat.
Wm. P. Gravot.
E. Viguet.
Leopold Hewlett.
Mme. Leopold A. Hewlett.
Wm. Henry Courselle.
Louise LeBlanc.
M. Jourdain.
Claré Baugue.
Caroline Benoski.
Jude Benoit.
W. Castenet.
Andrew Gare.
Clara Meux.
Belinda Harris.
Jean Génois.
490 F. Madron.
Malinda Madron.
Priscilla Davis.
Nancy Smith.
S. E. Davis.
Marceline Bethancourt.
Gustave Lachaux.
J. W. Harrison.
M. L. Thomy Elgar.
Mrs. Hablert.
M. Despaux.
Peter Sttalea.
Julia Mulla.
George Lohr.
Catarin Lohr.
C. P. Bringier.
James Beirs.
J. Dromete.
Terrera Espean Castein.
Mrs. J. W. Harrison.
Albin Soulié.
Bernard Soulié.
François Lacroix.
T. Redyard Lacroix.
Mme. Commagere.
D. B. Macarty.
William Moan.
Jose Sabates.
491 T. Villeretta.
Valentine Oechsner.
Jean Batiste.
Clane Bastelle.
Emile Benosh.
Carmelite L. Duegue.
D. B. North.
M. Detour.
E. Lavene.
M. Esnard.
Jean Karmorn.
Jacques Marque.
Eugene Galletin.
Jacob Fritz.
Emile Trathener.
Wm. Harwist.
Caroline Henricke.
Jean Batiste.
Clara Venon.
M. Deville.
Augusta Vittales.
Marie Volla.
Eliza Boudista.
Edward Janette.
Camelde Devon.
Marc Foune.
Arthur Casanovas.
Mrs. Osmane Casanovas.
Jos. Beaulieux.
Louise Beaulieux.
A. Mark.
Mrs. Armand Bertonier.
Miss. E. Boyer.
E. S. Bertonier.
A. A. Brougier.
C. Beaulieux.
G. Oger.
S. Armund.
Nancy Smith.
Oscar Bertonier.
T. Descomete.
P. Rousseau.
J. B. Eboling.
R. H. Schmidt.
Paul de Lasall.
Ed. Borgenzene.
Louis Bent.
Jean Couts.
Clodius Mattea.
Ed. de Varrite.
L. de Ville.
Asmane Beaudue.
Pierre de Bruine.
Avend P. Rousseau,
Mrs. Joseph Bush.
Jerome de Clouet.
Eloise Carnet.
Jean T. Devon.
Felix Pichon.
Gabriel Pichon.
Victori Pichon.
John Martin.
John Rimetz.
Jean Gravie.
Prre. Lemarier.
Jacob Neuhauser.
Martin Graff.
Vve. Larieux.

S. Magner, for self & wife.
J. Seruntino.
A. Renoult.
Mari Aders.
Pauline Seruntino.
Samuel McClelend.
E. J. Barkdull.
F. W. Falkner.
D. M. Ensworth.
Olive Barkdull.
Eliza Esnard.
John Torglet.
W. D. Duke.
Widow A. Alany.
W. Brotherton.
Mrs. C. Wright.
492 M. E. Pecora.
Tim. Jones.
Arthur Renuille.
Jacob Bottzein.
Katharine J. Willson.
Jos. Belmont.
Edward Lastigger.
Eugene Dumband.
George Gleason.
O. C. Bringier.
Miss Helen Chipley.
Mr. Claiborne.
Mrs. Miller.
E. Dunor.
J. Toledano.
Mme. Charles.
Mme. Lamie.
J. Durillier.
J. W. Ablin.
J. Tongly.
V. Demoruelle.
J. Crughetee.
Jean Derette.
E. G. Gottschalk.
L. Gonzal.
L. Bergamin.
E. Bringy.
L. Bowman.
F. Turneo.
G. Gotho.
Armand Gustine.
Andrew Clouet.
J. Beauduc.
Anna Williams.
Eugene Dunaud.
N. Bringier.
C. Perreauteau.
Annette Bodyung.
Mary C. Pript.
Vve. Reisten.
V. A. Mannie.
Jean Lavie.
P. Deuvicq.
Alfred Wiltz.
George E. Eng.
Henry Ernst.
Auguste Gautier.
Mme. Maurice.
M. Pecora.
Mme. Baptiste.
Succn. Delor.
J. Larie.
Marie Costallo.
S. B. Boisfontaine.
Mrs. Tricou.
Paul Fourchy.
E. A. Carlon.
T. Johnson.
L. Benois.

Order.—Case submitted as entered in the minutes of October 11th, 1871.

493 Second district court for the parish of Orleans, Hon. T. W. Collens, presiding.

JOS. FUENES & ALS. *vs.* MYRA C. GAINES. } No. 32979.

This case came up this day as per continuance, when, after hearing further argument of counsel, the court took the matter under advisement.

Bill of exception filed by defendant Dec. 1st, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Be it known that on this 25th Sept., 1871, defendant's counsel offered

in evidence the testimony of Louise Veuve Benguerel, taken under commission, and found in the printed New Orleans record, vol. 2, pages 782 to 786, inclusive; to the admission of that part of said testimony plaintiffs' counsel objected to on the grounds—

No grounds.

494 Which objection having been sustained by the court, and said portion of said testimony rejected, defendant's counsel excepted to the ruling of the court, and tender this their bill of exceptions, after submitting the same to opposite counsel, in order that the same may appear of record.

Bill of exceptions filed by defendant October 1st, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. } *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause plaintiffs' counsel offered in evidence the testimony of Z. Cavellier and other witness', as found in the printed N. O. record, vol. 2, 367 to 380, to the admission of which testimony defendant's counsel objected, on the ground that the same was irrelevant; which objections having been overruled, & said testimony admitted, defendant's counsel excepted, and tender this their bill of exceptions, after submitting the same to opposite counsel,

495 that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exception filed by defendant Dec. 1st, 1872.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. } *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause, plaintiffs by their motion to suppress certain testimony heretofore admitted on the proceeding, & taken by present defendant for the probate of the will of Daniel Clark, as fully set forth in the said written motion of plaintiffs to suppress, among other evidence moved the court to strike out that portion of the testimony of J. D. Beliechasse, being the last twelve lines of his answer to the 7th direct interrogatory, as found in the printed probate record, on page 159, being in the words following, to wit:

"I think it my duty to declare what I know to be a fact, that

496 said Desgrange was condemned for bigamy in marrying Miss Carrière (subsequently the mother of Myra) several years prior to the birth of said Myra. The prosecution and condemnation of said Desgrange for said crime of bigamy took place at New Orleans towards the close of the Spanish domination in Louisiana; his first and lawful wife, whom he had married previous to his coming to Louisiana, (as it was proved,) coming to New Orleans in pursuit of him. When the said Desgrange practiced the infamous deception of marrying Miss Carrière, it was the current opinion in New Orleans that he was a bachelor or a single man."

And which motion to strike out said testimony, was heard on the reasons stated in said motion to suppress, and because the statements of said Bellechasse was hearsay & not the best evidence of the prosecution & condemnation of said Desgrange for bigamy, the record of said proceedings, if they ever took place, being the best evidence.

Which motion having been sustained by the court, and said
497 testimony having been ordered to be stricken out, defendant's counsel exception to the ruling of the court.

And be it also remembered when on this trial defendant's counsel offered in evidence said testimony of said Bellechasse, plaintiffs' counsel objected to its admission on the same grounds, and which objections were sustained by the court, and said portion of said Bellechasse's testimony was rejected; to both of foregoing rulings of the court defendant's counsel then and there excepted, and tender this their bill of exceptions, after submitting the same to opposite counsel, in order that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions filed by defendant Dec. 1st, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

498 Be it known that on the trial of this cause plaintiffs' counsel offered in evidence the testimony of Z. Cavalier, Etienne Carraby, P. J. Yricou, as found in the New Orleans printed record, vol. 2, pages 376 to 380; James Courcelle, Sulalie Watkins, Jean B. Dejean, sr., H. J. Domingon, Charles Hausa, found in said volume, on pages from 397 to 403, and B. de Bellevue, on pages 342 to 345, and W. W. Montgomery, on page 395; Mrs. Julia A. C. Wood, Caroline Stannard, and A. M. Callender, as found on pages 519 to 536 of said volume; to the admission of which in evidence defendant's counsel objected on the ground that said testimony is irrelevant to the issue in this cause; which objection having been overruled by the court, and said testimony admitted, defendant's counsel except thereto, and tender this their bill of exceptions, after exhibiting the same to opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS.

499 *Bill of exceptions.—Filed by defendant Dec. 1st, 1871.*

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause, plaintiffs' counsel offered in evidence a certain document purporting to be a letter from J. Desgrange to Daniel Clark, dated 24th July, 1801, to the admission of which in evidence defendant's counsel objected on the ground that the said letter neither in its handwriting or signature was proved genuine, nor that Daniel Clark ever received said letter, and because the same is

irrelevant, which objections having been overruled by the court, and said document admitted, defendant's counsel excepts to said ruling, and tender this their bill of exception, after exhibiting the same to opposite counsel in order that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

500 *Bill of exceptions.—Filed by defendant Dec. 1st, 1871.*

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause, defendant's counsel offered in evidence the testimony of P. Boisfontaine as found on page 147 to 150, probate record, to the admission of which in evidence counsel objected; which objection so far as that portion of the testimony in answer to the fourth direct interrogatory on page 147, to wit:

"Lubin told me that when Mr. Relf went down with the keys from the armoir he followed, saw him then, on getting down, go into the office-room, and that Mr. Relf, on going into the office-room, locked the office-room door," were sustained by the court on the ground that though
501 admitted said *said* Lubin is dead, yet the said evidence is hearsay and not part of res *jestar*; and further, because at the time, said Lubin being a slave, could not have testified, and thereupon rejected said portion of the testimony of Boisfontaine, to which ruling of the court defendant's counsel excepted and tender this their bill of exceptions, after exhibiting the same to opposite counsel, in order that the same may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by defendant Dec. 1st, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Be it remembered that on the trial of this cause, on this 10th June, 1871, counsel of plaintiffs & intervenors offered in evidence the
502 document purporting to be an ecclesiastical record and translation thereof, as found in the so-called New Orleans record in vol. 2d, pages 497 to 518, and in connection therewith the testimony of Rev'd Antoine Blanc, found in vol. 1 of said record, p. 195–198, and in vol. 2d, on pages 494–'5, and the testimony of L. T. Caire and Eggleston, found in vol. 2, pages 495–'6, and of J. A. Quemper, on pages 370, 391 of same record and volume, and A. Cruzat on page 496, to the admission of which in evidence defendant's counsel objected on the ground—

1°. That the tribunal before which the proceedings were had was not recognized by the laws of that time in force in the province of Louisiana.

2°. Because said tribunal had no jurisdiction either to try or condemn for the crime of bigamy, and the same is irrelevant and incompetent, and

3°. Further, for the reasons given by the Supreme Court of the
503 United States in the case of Gaines vs. Hennen, and set forth on pages of 24 Howard's Reports; and further—

4°. Because there is no evidence offered to establish that the pretended signature of Marie Zulime Carrière to said document is genuine, which defendant's counsel deny, and reserve the right to positively and directly prove that said signature is not genuine, and further—

5°. Because it was a proceeding to which neither defendant nor the said Daniel Clark was a party.

6°. Because said record is not referred to in plaintiffs' petition as a ground of attacking the probate of the said will; which objections being overruled by the court and said document admitted by the court, not as a valid or conclusive proceeding or judgment taking effect as if the ecclesiastical court had jurisdiction, but as an ancient docu-
504 ment shewing contemporaneous facts bearing upon the marital status of Zulime Carrière, and to shew the antiquity of the documents and declarations contained in said ecclesiastical record.

Whereupon defendant's counsel excepted to said ruling, and tender this their bill of exceptions, after exhibiting the same to opposite counsel, that the whole may appear of record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by plaintiffs Dec. 1st, 1871.

Second dist. court for the parish of Orleans.

JOSEPH FUENTES & AL. } No. 32979.
vs.
MYRA C. GAINES.

Be it remembered that during the trial of the above-entitled cause counsel for the defendant made the offer of evidence numbered 101 in note of evidence as follows:

"All the evidence & testimony, and testimony & documents
505 offered therein, (referring to record No. 8646 of succession of Daniel Clark as evidence on the application to probate will) not offered in evidence by plaintiffs in this suit No. 32979 as contained in the printed probate record.

To which offer & testimony counsel for plaintiffs objected—

1°. As too uncertain & indefinite in its terms. That plaintiffs were entitled by law & of right to have each piece of testimony & evidence & document specified accurately, so as to enable them to state their objections to each, seriatim.

2°. That the offer, as made, devolved upon the plaintiffs illegally & unnecessarily, the burden and responsibility of searching through said "printed probate record" to ascertain what was intended to be covered or introduced as evidence by defendant.

506 3°. That the testimony, evidence, and documents referred to in the offer formed no part of the record of suit, No. 8646, entitled succession of Daniel Clark, and could not be offered in mass with it.

The court having overruled the foregoing objections, to which this bill of exceptions is reserved, counsel for plaintiffs, with reservation of all legal rights under the foregoing objections & bill of exceptions, proceeded to ascertain & state their objections to the testimony offered in said note of evidence, No. 101, as contained in said "printed probate record," as follows:

Plaintiffs objected to the reception in evidence of all or any part of the testimony, evidence, & documents referred to in said note of evidence, No. 101, but more especially to the depositions of—

1°. J. D. D. Bellechasse, as found in said printed record, pages 151 to 165, and pages 186 to 195.

507 2°. The deposition of Mrs. Henriette Smythe, as found in said record, pages 132–145.

3°. The deposition of P. Baron Boisfontaine, pages 145–150, of said record.

4°. The deposition of Dussau Delacroix, at pages 77–80.

5°. The deposition of S. B. Davis in said record, at pages 170–175.

6°. The deposition of G. Preval in said record, page 8.

To all which testimony plaintiffs objected—

1°. Upon the grounds set forth in the written motion to exclude testimony filed herein Sept. 21, 1871; all of which objections then made were reiterated & urged against the reception in evidence of the said depositions of each of said witnesses above named, and which objections are now referred to, for brevity, as a part hereof.

508 2°. Because in said depositions it is not stated or shown by either of said witnesses that they recognized the said alleged will of 1813 as entirely written, dated, & signed in the testator's handwriting, as having often seen him write and sign during his life-time;" and therefore said depositions are illegal & incomp'tent as evidence to prove the execution or existence of the said alleged will of 1813.

Plaintiffs also objected specially to the following portions of said testimony and depositions:

In deposition of Bellechasse, probate record, page 158, last five lines, in answer to 6th int., "Pitot, as well as others, always spoke with the utmost indignation of the fraudulent suppression or destruction of the said last will of 1813, and the fraudulent substitution in its place of the provisional will of 1811, all of which we attributed to interested villa'ny."

509 The same expression occurring on page 193 of same record. In his answer to 7th int., on page 159, "that before the birth of said Myra, Degrange had been condemned for bigamy in marrying Miss Carrière," * * * and * * * "I think it my duty now to declare what I know to be a fact, that said Degrange was condemned for bigamy in marrying Miss Carrière, (subsequently the mother of Myra,) several years prior to the birth of said Myra. The prosecution & condemnation of said Degrange for said crime of bigamy took place at New Orleans towards the close of the Spanish domination in Louisiana; his first and lawful wife, whom he had married prior to his coming to Louisiana, (as it was proved,) coming to New Orleans in pursuit of him. When Degrange practised the infamous deception of marrying Miss Carrière it was the current opinion in New Orleans that he was a bachelor or single man."

510 In his answer to 7th x-int., on page 161: "In these letters I informed her of the confidential trust held by me for her from her father, and of the fraudulent suppression of her father's last will, made in her favor."

In his answer to the 11 x-int., on page 162: "But that will was fraudulently suppressed, & Clark's old provisional will of a dozen lines, of 1811, that was deposited in the hands of Relf, was the one which he, Relf, delivered up for probate instead of the last will of Clark of 1813."

In his answer to 12th x-int., on page 162: "For she had the capacity of acquiring those rights, as the bigamy of Desgrange in marrying Miss Carrière left her in a free condition, and Myra was born several

years after the detection and establishment of Desgrange's bigamy in marrying Miss Carrière, the mother of Myra."

In the deposition of P. Baron Boisfontaine, in said probate record, p. 149, his answer to 6th int., as follows: "When, after Mr. Clark's
511 death, the disappearance of his last will was the subject of conversation, I related what Mr. Clark told me about his last will in his last sickness. Judge Pitot & John Lynd told me that they read it not many days before Mr. Clark's last sickness; that its content' corresponded with what Mr. Clark had told me about it; that when they read it it was finished; was dated & signed by Mr. Clark; was an olographic; was in Mr. Clark's handwriting; that in it he acknowledged the said Myra as his legitimate daughter & bequeathed all his estate to her; gave an annuity to his mother and legacies to some friends. The Chevalier Delacroix was tutor of his daughter, said Myra. Chevalier Delacroix, Col. Bellechasse, Judge Pitot were executors; * * * the wife of William Harper told me she read it."

In answer to the 2d x-int. in said probate record, page' 149-150, "I can only declare it my belief that Mr. Clark was her husband."
512 * * * "It was represented to me that this lady married Degrange in good faith; but it was found out some time afterwards that he had already a living wife when the lady Mme. Carrière separated from him. Mr. Clark, some time after this, married her at the North. When the time arrived for it to be made public, interested persons had *proceeded* a false state of things between them; and this lady, living in Philadelphia, and Mr. Clark not there, was persuaded by a lawyer employed that the marriage with Mr. Clark was invalid, which believing, she married Monsieur Gardette." * * * "From the above I believe there was a marriage."

And counsel for plaintiffs stated and urged as grounds for the rejection as evidence of the above and foregoing portions of the testimony of said witness, that they were hearsay, irrelevant—mere matters of opinion—as repeating conversations of third persons, as res inter
513 alios acta, & when said witness speak of the prosecution & condemnation of Desgrange for bigamy, and of the contents of letters, records, decrees, and other written matter, as not being the best evidence thereof, and that the said records & decrees and written matter spoken of should be produced as the best evidence.

And thereupon the court overruled the objections so far as to adhere to & reiterate the ruling heretofore made upon the motion to exclude testimony filed Sept. 21st, 1871, and above referred to; but the court sustained the objections to the portions of the testimony of the said witnesses herein above particularly recited and set forth at length, and excluded the said described portions.

To which ruling of the court, so far as it overruled any portion of plaintiffs' objections, & admitted any portion of the testimony of said witnesses plaintiffs excepted at the time, and tendered this their bill of exceptions, which is signed by the judge & made part of the record.

514 And to which ruling of the court, so far as it sustained any portion of plaintiffs' objections & ruled out any portion of the testimony of said witnesses, defendant's counsel excepted at the time, & tendered this their bill of exceptions, which is signed by the judge & made part of the record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exceptions.—Filed by plaintiffs Dec. 1st, 1872.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. vs. MYRA C. GAINES. } No. 32979.

Be it remembered that during the trial of the above-entitled cause defendant's counsel offered in evidence—

1°. The deposition of J. D. D. Bellechasse, as found in the New Orleans record, vol. 2, pages 226–241, described in note of evidence No. 108.

2°. The depositions of Mrs. Harriette Smythe, or Harper, as
515 found in same record & volume, at pages 212–226, and in same record, vol. 1, pages 141, 152, & also in record of suit No. 122, as described in the notes of evidence numbered 103, 109, & 110.

To which testimony plaintiffs objected—

1°. Upon the grounds set forth in the written motion to exclude testimony filed herein Sept. 21st, 1871, all of which objections then made were reiterated & urged against the reception in evidence of the above described depositions, or any part thereof, and which are referred to for brevity as part thereof.

2°. Because in said depositions it is not stated or shown by either of said witnesses that they recognized the said alleged will of 1813 "as entirely written, dated, & signed in the testator's handwriting, as having often seen him write & sign during his life-time," and therefore said depositions are illegal & incompetent as evidence to prove the ex-
516 ecution or existence of the said alleged will of 1813.

3°. Plaintiffs also objected specially to the following portions of said depositions:

In the deposition of Bellechasse, New Orleans record, vol. 2, pages 234, at the end of answer to 6th int., "Pitot, as well as others, always spoke with the utmost indignation of the fraudulent suppression or destruction of the said last will of 1813, and the fraudulent substitution in its place of the provisional will of 1811, all of which we attributed to interested villa'ny."

In his answer to 7th int., on p. 235, "That, before the birth of said Myra, Degrange had been condemned for bigamy in marrying Miss Carrière." * * * And * * "I think it my *my* duty now to declare what I know to be a fact, that said Degrange was condemned for bigamy in marrying Miss Carrière, (subsequently the mother of Myra,) several years prior to the birth of said Myra. The prosecution and con-
517 demnation of said Degrange for said crime of bigamy took place at New Orleans towards the close of the Spanish domination in Louisiana; his first and lawful wife, whom he had married previous to his coming to Louisiana, (as it was found,) coming to New Orleans in pursuit of him. When said Desgrange practised the infamous deception of marrying Miss Carrière, it was the current opinion in New Orleans that he was a bachelor or single man."

In his answer to 7th x-int., on p. 237: "In these letters I informed her * * * of the fraudulent suppression of her father's last will, made in her favor."

In his answer to the 11th x-int., p. 238: "But that will was fraudulently suppressed, and Clark's old provisional will, of a dozen lines, of 1811, that was deposited in the hands of Relf, was the one which he, Relf, delivered up for probate instead of the last will of Clark of 1813."

In answer to x-int. 12: "For she had the capacity of acquiring those rights, as the bigamy of Desgrange in marrying Miss Car-
518 rière left her in a free condition, and Myra was born several years after the detection and establishment of Desgrange's bigamy in marrying Miss Carrière, the mother of Myra."

In the deposition of Harriette Smythe, in her answer to 9th x-int., on page 225 of vol. 2, N. O. record: "I understood that subsequently Desgrange was condemned criminally for bigamy in marrying Miss Carrière while he had a living wife. This was previous to my arrival in New Orleans. After my arrival I understood that the same fact was established in a civil action. Mr. Clark had papers to prove this fact which, I do not doubt, would have been found with his last will if that will had not been fraudulently suppressed after his death." * * * "The place of her education, traced out and provid' for by her father in his last will of 1813, having been frustrated by the suppression or purloining of that will."

In deposition of Harriette Harper, N. O. record, vol. 1, on page
519 150, in ans. to 6th int.: "After Mr. Clark's death, Col. Bellechasse stopped at my house, and told me Mr. Clark's last will was suppressed."

Also, on page 152, in answer to x-int. 7: "I could have but one opinion of Mr. Relf after having heard from the first men in New Orleans that it was their firm conviction that Richard Relf destroyed his benefactor's last will." * * * "All the remarks I have made with regard to Mr. Relf was in connection with the destruction of this will and the embezzlement of the estate bequeathed to his daughter."

Thereupon the court overruled the objections so far to adhere to & reiterate the ruling heretofore made upon the motion to exclude testimony filed Sept. 21st, 1870, and above referred to; but the court sustained the objections to the portions of the testimony of said witnesses herein above particularly recited and set forth at length, and excluded the said described portions.

To which ruling of the court, so far as it overruled any portion
520 of plaintiffs' objections and admitted any portion of the testimony of said witnesses, plaintiffs excepted at the time, and tendered this their bill of exceptions, which is signed by the judge, and made part of the record.

And to which ruling of the court, so far as it sustained any portion of plaintiffs' objections and ruled out any portion of the testimony of said witnesses, defendant's counsel excepted at the time, and tendered this their bill of exceptions, which is signed by the judge, and made part of the record.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exception.—Filed by plaintiffs Dec. 1st, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. } No. 32979.
vs.
MYRA C. GAINES.

Be it remembered that, on the trial of the above-entitled cause,
521 defendant offered in evidence the three depositions of Madame Sophie Despau, being entries Nos. 105, 160, & 162 in the note of evidence, and as being found in New Orleans printed record, vol. 2, pages 244–256 & 606–610 & 649–651.

And thereupon plaintiffs' counsel objected thereto, and specially to the following statements of said witnesses:

On page 251, that Zulime "heard that he (Desgrange) had another wife living at the time of his marriage with her, & this information was confirmed by subsequent admissions of Degrange."

"We were told that a Mr. Gardette was a witness to Desgrange's prior marriage. We proceeded to Philadelphia, & found Mr. Gardette, who told us that he was present at said prior marriage of Desgrange; that he afterwards knew Desgrange & his wife by this marriage, & that his wife had gone to France." * * * "Soon afterwards our
522 sister, Mme. Calliavet, wrote to us from New Orleans that Desgrange's former wife (the one he had at the time of marrying Zulime) had arrived in New Orleans. We hastened our return to New Orleans, where Desgranges was prosecuted for bigamy." * * "Mr. Desgrange was condemned for bigamy for marrying the said Zulime, & was cast into prison," &c., &c. * * * "The grounds of said suit were that Desgrange had imposed himself upon her in marriage at a time when he had a lawful living wife. Judgment in said suit was rendered against Desgrange."

And on page 252, "and as I have already stated in answer to the preceding interrogatory, imposed himself in marriage on my sister Zulime. I have already stated the fact of his prosecution & conviction for bigamy," &c.

And on pages 254 & 255, when the witness repeats a statement of what "her sister Zulime told her that Clark had an interview with her in Philadelphia, after her marriage with Gardette, & the
523 conversation between Clark & Zulime, thus stated.

And plaintiffs objected to the like statements the same in substance, but changed somewhat in expression, in the said two other depositions of said witness, as found in said record & volume, pages 606 to 610, and 647 to 651.

Also the following on page 608: "Col. Bellechasse stated to Chevalier de Morejon, in 1827, that if Richard Relf had not destroyed Daniel Clark's last will, that his, Clark's, daughter would have been the richest lady in this country; * * * and that in this will of 1813 Daniel Clark had acknowledged her to be his legitimate daughter; and that this will was written in Daniel Clark's handwriting."

The above testimony, & all the testimony of said witness contained in said depositions of like character, were objected to upon the
524 following grounds, to wit: as hearsay, as irrelevant, as stating mere matters of opinion, as repeating conversations of third persons, as not being the best evidence of the prosecution and condemnation of Desgrange for bigamy, the record & judgment of such condemnation being the best evidence; as stating the contents of records, suits, pleadings, letters, & other written matter, of which the said records, pleadings, letters, &c., are the best evidence & parol proof thereof, incompetent without proof of loss of the writings & records referred to.

And thereupon the court sustained said objections, excluded said testimony above specified & referred to, except as to the statement made by Gardette to the witness that he was present at said prior marriage of Desgrange.

525 To which ruling of the court plaintiffs excepted, & tendered this their bill of exceptions, so far as it admitted any portion of said evidence. The defendant also excepted at the time to the ruling of the court so far as it excluded any portion of said evidence.

(Signed) T. WHARTON COLLENS, *Judge.*

Bill of exception.—Filed by plaintiffs December 1st, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & ALS. }
vs. } No. 32979.
MYRA C. GAINES. }

Be it remembered that, during the trial of the above cause, defendant's counsel offered in evidence the three depositions of Madame Rose Caillavet, being entries 106, 161, & 163 in note of evidence, & as being found in New Orleans record, vol. 2, at pages 256 to 259, 655 to 657, & 651 to 654.

526 Thereupon plaintiffs objected thereto, & specially to the following portions thereof:

On page 256: "My intimacy with him, growing out of his marriage with my sister," &c. * * * "Desgrange, who was found to have had a lawful wife living at the time of his, Desgrange', marriage with her." * * * "While there, my sister Zulime wrote to me that she and Mr. Clark were married," (page 257.) * * *

On page 257: "I have always understood that the marriage between my sister and Mr. Clark was a private one, and that it was not promulgated by Mr. Clark in his life-time, unless he did so in a last will made a short time previous to his death. I have heard that such a last will was made, but it was believed to have been suppressed or destroyed after his death."

"He (Desgrange) passed for an unmarried man, & imposed him-
527 self on my sister Zulime. Some years after this marriage it became known in New Orleans that he had a prior lawful wife living." * * * "At a later period Mr. Desgrange was prosecuted, found guilty of bigamy in having married my sister, &c. * * I did not myself knew the first wife of Desgrange, but it is within my knowledge that she came to New Orleans, and while there fully established her pretensions as his lawful wife."

And, on page 258, "My sister was 19 or 20 years old when she married Mr. Clark." * * "After her marriage with Mr. Clark at Philadelphia, she kept house, &c., &c.;" "their marriage being secret, &c."

And plaintiffs objected to *lot* statements of this witness in the said other two depositions as found in same record and volume, at pages 651, 654, & 654 to 657.

528 The said depositions, & especially the above portions enumerated and referred to, were objected to upon the following grounds, to wit: As hearsay; as irrelevant; as stating merely matters of opinion; as respecting conversations of third persons; as not being the best evidence of the prosecution and conviction of Des Grange for bigamy, the record & judgment of such condemnation being the best evidence; as stating the contents of records, suits, pleadings, letters, & other written matter, of which said records, pleadings, letters, &c., are the best & only competent evidence without proof of loss of the writings, records, &c., referred to; and that the same cannot be established by parol in the manner sought.

The court sustained said objections and excluded the above-
529 described & referred-to testimony, except the statement by the witness that "after her marriage with Mr. Clark, at Philadelphia, she kept house, &c.;" "their marriage being secret."

To which ruling of the court plaintiffs excepted so far as it admitted any portion of said evidence, and tendered this their bill of exceptions.

The defendant also excepted at the time to the ruling of the court so far as it excluded any portion of said evidence.

(Signed) T. WHARTON COLLENS, *Judge.*

Reasons for judgment.—Filed December 4th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA CLARK GAINES. } No. 32979.

In this court, more than sixteen years ago, the defendant filed
530 a petition alleging that, on the 13th of July, 1813, Daniel Clark made in olographic form his last will; and also alleging that the said will, in substance and effect, made the petitioner the universal legatee of said Clark, as follows:

"I hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her the said Myra all my estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter named." Other dispositions are set forth, among which are the appointment of Chevalier Dusnau Delacroix, as tutor to said Myra; the legacy of an annuity of two thousand dollars to Mary Clark, mother of said Daniel Clark; the legacy of an annuity of $500.00 to Caroline Degrange until she arrives at the
531 age of majority, followed by a legacy of $5,000.00 to the same persons; a legacy of $5,000.00 to a son of James Pitot; one of $5,000.00 to a son of Mr. Dubuys; a provision for the freedom & maintenance of the slave Lubin, and the appointment of T. D. Delacroix, James Pitot, and Joseph D. D. Bellechasse as executors.

She further represents that, at the death of said Clark, said will was left among the papers at his residence; that, after his decease, diligent search was made for said will, but the same could not be found, nor has it been since, and that it was either mislaid, lost, or destroyed; and that the destruction of said will has prevented her from giving the contents thereof with greater certainty.

She concluded her petition by praying that the alleged will be recorded and its execution ordered.

532 The known heirs of Clark being absent, the court appointed a curator to represent them, and contradictorily with the curator, proof of the allegations of this petition were administered. These proofs the court considered insufficient, and refused the probate, but upon appeal to the supreme court the decision was reversed, and judgment was rendered decreeing "that the will of Daniel Clark, dated New Orleans, July 13th, 1813, as set forth in plaintiffs' petition, be recognized as his last will and testament, and that the same be ordered to be recorded and executed as such, &c."

The supreme court in the body of their decision say, "The plaintiff presents to us a prima-facia case which entitles her to relief. The decision which we make does not conclude any one who may desire
533 to (1) contest the will in a direct action; and (2) to show that no such will was executed." (See 11 An., 131,) Succession of Clark; see (13 An., 138) Heirs of Clark vs. Myra Clark Gaines.

Fuentes and others now appear to avail themselves of the right of action thus reserved to any interested party. They represent that Daniel Clark left a will dated 20th May, 1811, which was probated in this court on August 17th, 1813, by which Mrs. Mary Clark, who was his mother and his sole and legal heir, was instituted his universal legatee; that he made no other will; and that in the circuit court of the United States, Myra Clark Gaines has sued them for certain property, setting up the will of July 13th, 1813, as a muniment of title. They refer to the record of those suits, from which it appears she has sued them as holders, as deriving said property from said succession of
534 Daniel Clark, through his mother, said Mary Clark, who is also his universal legatee, under the will of 1811.

Their petitions set forth a number of grounds from which they conclude, 1st, that Clark did not leave the alleged will acknowledging Myra to be his legitimate daughter, and instituting her his universal legatee, and 2d, that even had he done so, such a will would be invalid, null, and void.

They pray for judgment, revoking the said probated will of July 13th, 1813, an' annulling the decree of probate thereof.

The evidence adduced by both parties on the merits may be conveniently examined under four heads or questions, which being stated in chronological order, are as follows:

1°. At the time of the birth of Myra Clark Gaines, was Zulime Carriére, her mother, the lawful wife of Jerome Desgrange?

535 2°. Did Daniel Clark ever marry Zulime Currière; and if he did, was it in good faith, having no reasonable grounds for considering her the wife of another?

3°. Did Daniel Clark make and leave an olographic will (written, dated, & signed by himself,) of a date subsequent to that of 20th May, 1811?

4°. If he did make such subsequent will, were its contents those alleged by Mrs. Gaines, id est, did it acknowledge her as "legitimate" and institute her universal legatee?

1°. That a marriage of Zulime Carrière to Jerome Desgrange took place on the 2d December, 1794, in due form of law, is indubitably established and admitted among the uncontroverted facts of this case; but it is contended that Des Grange was then a married man, was subsequently convicted of having committed bigamy in marrying
536 Zulime, and that therefore the marriage was a nullity. In support of the allegation that Desgrange had previously married another woman, a certificate is adduced, showing that Barbara M. Orei was married to one Jacob Degrange, in the city of New York, on the 6th July, 1790. The two names Jerome and Jacob being different, it was necessary to show that Jerome was the person to whom the name of Jacob is given in the New York certificate. This is attempted by means of, (1,) oral evidence of a trial and conviction of Desgrange on a charge of bigamy; (2,) the circulation of a contemporaneous rumor that he had been convicted and imprisoned for the crime, but escaped from prison and the territory; and (3,) his own verbal admission to a witness that he had deceived Zulime, and was indeed a previously married man.

537 The proffered oral evidence was excluded as proof of a judicial proceeding and judgment, because it was not the best, and there was no evidence of the loss of any record of any such prosecution, if it ever existed, which was not shown, and because the witness, who spoke of a conviction of Desgrange for bigamy, though they roundly said there had been one, evidently spoke from hearsay, had no personal

knowledge of it, and did not even say in what court it was supposed it had taken place. The rumor was admitted not to prove a judicial trial and conviction, but merely as tending to show that Clark, if indeed he did marry Zulime Carrière, might have been in good faith from having believed the report.

The admission sworn to by Mrs. Benguerelle, though admissible, is entitled to no weight, not only because such evidence
538 of admissions is in its nature the weakest kind of evidence, but, also, because the confession, under the circumstances stated, is improbable, unsupported by anything corroborative, and, indeed, would be in conflict with Desgrange's contemporaneous denial of the charge. A man in danger of a prosecution for a heinous crime is not apt to confess it, particularly when, as in this instance, there was no conceivable necessity or motion for doing so. It was not an ordinary matter, such as a debt or a contract which a person would probably speak of to a friend or acquaintance; it was a criminal charge entailing a terrible punishment under the Spanish law; and yet, even had it been the mere admission of a common debt, it would by itself be received with great caution, and, as against a dead man, would not be received at all.
539 The reason is, that even were such testimony untrue and no such confession had ever been made, the accused must of necessity be powerless to contradict it. When also we consider that more than thirty years had elapsed since the private conversation Mrs. Benguerelle relates, the justice of disregarding it as proof of so grave a matter is still more apparent.

The witnesses who testify to the rumor that Desgrange was convicted of bigamy are Despau, Callavet, Benguerelle, Bellechasse, and Davis. The three first are women, two of them being aunts of Mrs. Gaines. The fourth, Bellechasse, arrived in New Orleans two years after the supposed date of the supposed conviction; and the fifth, Davis, was at the time a ship captain, sailing from New Orleans, and does not say when he was first "told" of the rumor, and he was Mrs. Gaines' foster father.
540 Neither Bellechasse nor Davis knew Desgrange. They all evidently testified with a strong bias. None of the other numerous witnesses confirm their testimony on this point, though many of them had equal and, indeed, better opportunities of knowing. This is very slender and unsatisfactory, even as verbal evidence of a notorious conviction and sentence before a court, taking place in a small place where such matters are usually talked of, known to everybody. Certainly, if it had actually taken place and caused so much excitement, as stated, there must have been in 1835, when this case commenced, many others of the people generally, and particularly judges, clerks, jailors, and other officers of court, and lawyers, who would have been able to testify to the same effect and have named the court in which the proceedings took place; but none such have corroborated the testimony of
541 the five mafilting witnesses in regard to this point. On the contrary, even Mrs. Gaines' other witnesses seem ignorant of it, and, among the rest, Mr. and Mrs. Boisfontaine, who are strong witnesses on Mrs. Gaines' side, and who arrived in New Orleans in 1804, and who knew Zulime personally, never heard of such a rumor, and in their intercourse with her regarded her as a widow—the widow of Jerome Desgrange.

So sacred a tie and so important a contract as a marriage, when so well authenticated as that of Zulime Carrière to Jerome Desgrange,

cannot be set aside as if it had never existed, or as an absolute nullity, on so weak a showing as this.

Were the matter to rest here, I would have to conclude that there is no evidence to identify Jerome Desgrange with the Jacob Des-
542 grange who was married in New York, and no sufficient evidence of a conviction for bigamy. Going further into the evidence, I find much tending forcibly to fortify that conclusion, and, indeed, to conclude that, in fact, there was no such identity and no such bigamy.

It is to be noted that the only time when (under the circumstances proved) a prosecution and trial of Desgrange for bigamy could have taken place, was in the summer and autumn of 1802. It was then or never. He then left New Orleans, and did not return till the fall of 1805, after the cession of Louisiana to the United States. On the 30th November, 1805, Zulime Carrière, alleging herself to be the wife of Jerome Desgrange, filed her petition in the county court of New Orleans, suing him for the alimony due by husband to wife, and praying judgment to that effect for $500.00, and which she obtained against him a few
543 days afterwards.

Though served with citation, he made no defense, thus himself corroborating the truth and justice of her demand. Now, supposing that in the mean time she had, as is pretended, been secretly married to Clark, and that the nullity of her marriage to Desgrange had become then easily proved and even notorious, having been made evident by a public conviction for bigamy only three years before, and that she then really had the strong motives which would have necessarily filled her mind after a marriage with Clark, to repudiate and ignore her marriage with Desgrange, would she have instituted this suit for alimony? I think not. This suit for alimony is strong evidence that no such notorious bigamy or conviction thereof had taken place.

Indeed, it was no doubt generally known then, in the city, that
544 there had been in September, 1802, before the holy inquisition, an ecclesiastical court, without jurisdiction in the province, an apparently sham prosecution, but not a conviction of Desgrange for bigamy. That court, on the contrary, exerted its pretended jurisdiction only to acquit him of the charge.

With the evidence it had before it, and which is still extant in the ecclesiastical record, no other conclusion can be drawn but that Jerome Desgrange was not guilty. The woman with whom it was alleged he had been previously married, denied before the court that such a marriage had been celebrated, and there was no other proof against him. That Zulime Carrière was well aware of the evidence and acquittal, is the least that can be said; for it would seem from the record that she also gave evidence in her husband's favor. Her signature to the
545 deposition which purports to be hers, is impeached; but whether it be genuine or not is immaterial, for it would not have prevented, but, on the contrary, would have confirmed, the acquittal.

There could not have been a previous or subsequent conviction and sentence before the regular courts having jurisdiction to punish, for then Desgrange, if convicted before the regular courts, could not have been released as he was from imprisonment by the ecclesiastical courts.

He left the colony immediately upon the release, and was absent during the remaining period of the Spanish dominion; and could, during that absence, be only prosecuted for contumacy, to suppose which would be entirely gratuitous.

But there is in evidence a mutilated record from the same county court that condemned Desgrange to pay alimony to Zulime, which gives

546 some slight color to the allegation of the nullity of their marriage.

The petition in that case has disappeared, but, from the answer and subsequent proceedings, it appears that on the 21st June, 1806, Zulime, using only her maiden name, filed a petition against Desgrange, and had him cited as an absentee through an attorney appointed by the court to represent him. The exception and answer filed by the attorney indicates that the suit was for a divorce and $100.00 damages. The exception was that the court could not take cognizance of the case, because the damages "cannot be enquired into or assessed until after the judgment of the court touching the validity of the marriage between the petitioner and defendant shall be first declared." The exceptions were overruled, an answer filed, the case tried on its merrits, and judgment rendered in the following words: "Judgment for plaintiff, damages

547 $100, July 24th, 1866;" that is all. The case was tried on the very day the answer was filed. Three witnesses were heard. Their depositions are not in writing, and no documentary evidence was filed, except the certificate of the marriage between Desgrange and Zulime. Whether the validity of the marriage was denied in the lost petition or not cannot of course be positively known, and even were it inferred that Zulime averred the invalidity of her marriage, it cannot be known whether it was for absolute or relative nullities. The fair inference, I think, is, that since it was a suit for a divorce, the marital relation was assumed or alleged to exist; and that it was on this very allegation or assumption that the attorney based his exception to the demand for money, contending that a wife could not sue her husband for damages, unless it be first decided that there was no valid

548 marriage between them. The further inference is, that the judge did not think it necessary to pass upon the question of the validity of the marriage in order to give judgment for damages in favor of the wife, while at the same time he granted her a divorce, for he overruled the exception purely and simply, thus deciding the proposition as stated to be erroneous. The exception expressly regards the suit as one for a divorce, and such a suit cannot be maintained by a party who at the same time denies a valid marriage.

So far, then, it must be considered that even as late as July, 1806, Zulime Carrière knew of, or could produce, no legal evidence to show that her marriage with Desgrange was a nullity. This divorce suit cannot, I think, be taken as a suit in nullity, and even were it so, it is

549 equally clear that the county court had, ratione materiæ, no more jurisdiction of a suit in nullity of marriage, or of divorce, than the ecclesiastical court had of prosecutions to punish a man by imprisonment and the like for bigamy. This is clear from the statutes creating the county court and defining its jurisdiction. See acts 1804–'5, page 150, and 1805, page 42. Hence, it cannot even be said that Zulime was lawfully divorced. Moreover, even had this divorce been pronounced by a competent court, Mrs. Gaines was born before its date. She was born in June, 1804; and though her birth, no doubt, resulted from the intercourse of her mother with Daniel Clark, it is also true that it happened during the existence of the marriage with Desgrange.

I pass details tending to the same conclusion to proceed with the examination required by the second question.

550 II. The theory of the alleged marriage between Daniel Clark and Zulime Carrière is that it took place in Philadelphia in 1802 or 1803. The witness who swears to it, Mrs. Despau, Zulime's sister, does not give the precise date, and says no certificate was given by the priest to the parties, nor could one be afterward procured, or even the

name of the priest, or the church at which he ministered be ascertained. It is, however, certain from other documents and testimony that the only time Clark and Zulime were together in Philadelaphia, and could possibly have married there, in 1802 or 1803, was during a few days between 27th of July and the 15th of August, 1802, on which last-mentioned day he left New York on a voyage to Europe, from whence he returned in a direct vessel to New Orleans, in February, 1803. He did not leave New Orleans subsequent to that date in that year.

551 It is shown that Desgrange had previously, some time near 26th March, 1801, left New Orleans for Europe, and on his departure was on friendly terms with his wife. He appointed her to be his agent during his absence, and also wrote from Europe to Clark, expressing affection for her, and sending a package to be delivered to her. During this absence of Desgrange, which lasted fifteen months, Clark had illicit intercourse with Zulime, and sent her in the spring of 1802 to Philadelphia, to be there delivered of a child, which was named Caroline. It was a few weeks after the birth of this child that Clark passed through Philadelphia on his way to Europe.

Mrs. Despau says that the object for which Zulime went to Philadelphia was only to search for evidence of Desgrange' previous marriage, while she omits the fact that Caroline was born during her sojourn in that city, as well as the necessity of concealing the birth of the

552 adulterous child from the public of New Orleans and from Desgrange, whose return from Europe was expected, motives fully sufficient to account for the voyage, independently of any search or proof of another marriage. She says that while on their trip she and Zulime also went as far as New York to search for the marriage-record in that city; but on arrival there they found that the registry of marriage had been destroyed. If she meant the registry of the marriage between Desgrange and De Orci, the fact is not so, for it existed as late as the 11th Septhember, 1806, at which date the certificate filed was issued by Rev. O'Brien, of St. Peter's Church, N. Y.; at any rate they did not find it then, but on their return to Philadelphia they met with Mr. Gardette, who told them he knew Desgrange, and had been one of the witnesses of the marriage they sought to prove. This statement, if it was made, is not confirmed by the certificate pro-

553 duced, if that certificate shows the marriage he intended to refer to. It is on no better or other evidence than this, that it is said Clark consented to marry Zulime at once, with a reservation that the marriage should remain secret till he could have Desgrange's bigamy judicially established. It is conceded that Clark was well acquainted with the laws in relation to marriage; that he was a man of education, of uncommon intellectual power, jealous of the dignity of his standing in society, proud of the rank of his family, and vain of his reputation for chivalrous conduct. He knew that if Zulime failed to prove bigamy against Desgrange, she in turn would be exposed to the same charges should he marry her. He could see how insufficient such a statement, as it is alleged was made by Gardette, would be by itself, and from such a distance from Louisiana. She bore a bad reputa-

54 tion for chastity generally, a fact which Clark could not help knowing. Indeed, he himself had had an illicit child by her, while she still believed herself the lawful wife of Desgrange. Must I believe that, under these circumstances, such a man hurried to bind himself indissolubly by the utmost sacred ties to such a woman? I

think not. Even had he done so, it could not have been done in good faith.

But it is proper to look to Clark and Zulime's course after their alleged marriage, to ascertain whether they acted consistently with the relation of a husband and wife who, though secretly married, intended, as soon as possible, to acknowledge one another and live together as such before the world.

They had taken a decisive step which (if indeed it was taken) necessitated a new line of conduct on the part of each and both. Clearly it was necessary for consistency, as well as the proposed
555 end of being one day regarded as having been married since August, 1802 that Zulime should at once break with Desgrange, refuse to bear his name, and publicly deny the validity of her marriage with him. Clark knowing the law, and desiring that his wife should be as much as possible his own, must have required and counseled her to take this course; but, as we have seen, she did not pursue it. Desgrange continued to be her publicly acknowledged husband. She continued to bear his name. It is probable she was a witness in his favor before the ecclesiastical court afterward; she sued Desgrange, as her husband, for alimony, and finally having a judgment of the county court divorcing her from him, contracted marriage with Gardette, which, after that judgment, she could do in good faith only on the ground that she was under no legal obligation to Clark.

556 On his part, Clark does not appear to have taken pains to prevent his wife from appearing to be the wife of another, or to have done anything towards making it evident that the Desgrange marriage was a nullity; of if the nullity was indeed made apparent by a judgment against Desgrange for bigamy, as asserted, he did not, as it is said he had promised, at once make his marriage with Zulime public. It is clear that if such a judgment was rendered in 1802, there was no occasion to postpone the publication. The pretext for a continuous concealment, viz, a quarrel between him and Zulime, and the marriage with Gardette were still deeply wrapped in the impenetrable womb of time. They did not exist; they could not be foreseen; so that if, on the one hand, there had been a condemnation of des Grange for *for*
557 bigamy, and on the other a marriage with Clark, consistency, good faith, and the birth of Myra, in 1804, required the immediate publicity of that marriage. Instead of this we find him and her concealing the birth of the child, as in a case of bastardy; and no mention of marriage is made, even to the persons who mainly assisted him in that concealment. Samuel B. Davis, who procured a room in an unoccupied house for Zulime's secret delivery, he who took the child as born of unknown parents, and gave it his name, and nursed it to womanhood, and who did this for the sake of intimate and confidential friendship, never heard from Clark any mention of a marriage with the mother. To Mrs. Harper, the kind and disinterested lady who nursed the child, and claims to have been Clark's confidential friend, he
558 never mentioned the alleged marriage as an event that had actually happened at any time or place. Neither did he mention it as a fact to any other intimate.

Bellechasse and Jos. Baron Boisfontaine say he did not mention it to them, nor did he to Delacroix or to Miller. True, he acknowledged to them that Myra was his child; that he would acknowledge her as such in his will; that he would make a will in her favor; evinced the warmest affection for her, but never told any of them about the alleged marriage. This reticence, under all the circumstances, is very significant. Then

there is Mazureau's letter, which is evidence, without any objection to his not having been sworn, and without objection to its having been written in violation of professional confidence. These objections having been tacitly waived, there are no grounds for disbelieving
559 the witness. His truthfulness is beyond dispute. He says Clark represented Myra to him as a natural child. Next, there is the fact corroborative of Mazureau's testimony that Clark provided for Myra, by means of confidential trusts, conveyances of property to Bellechasse and Delacroix, for her benefit, a fact entirely consistent with the opinion that Clark was not married to Zulime; that he knew Myra was incapable of being his heir, and entirely inconsistent with the nullity of one marriage and the reality of the other. Besides this, there is in evidence a letter from Daniel Clark to his sister, dated 14th October, 1802, in which he assures her that there is no Mrs. Clark, nor any person likely to become so, for some time to come. Also, it is shown by the witnesses on both sides, that he afterwards courted Miss Caton,
560 but did not marry her because his proposal was refused on account of his inability to make as large a settlement on her as she and her parents required.

So again I must conclude that the alleged marriage did not take place, or at least that the evidence does not permit me to regard it as an established fact.

III. On the question whether or not Clark did make and leave a will written, dated, and signed by himself subsequent to that of May 20th, 1811, I concur in the opinion delivered by Judge Lea when the matter was first tried in this court. After stating the evidence, which it is unnecessary to recapitulate again, and which fully sustained his view, he says.

"I now think there is no doubt, setting aside the testimony of Mrs. William Harper and Bellechasse, that Clark did execute a will shortly
561 before his death; that the principal object of making this will was to recognize as his daughter the present applicant, (Myra C. Gaines,) and to make suitable provision for her; that the executors of that will were Pitot, Bellechasse, and Delacroix; and that Delacroix was appointed tutor to his daughter, Myra; that his will must have been in existence until within a very short time previous to Clark's death, if not after that event, and Clark himself died believing it was in existence."

True, much new evidence has been adduced, of which Judge Lea did not have the benefit. Some of this evidence, indeed, tends to a different conclusion, but not with sufficient force to shake his opinion materially. On the whole, it is well sustained by the evidence as now stand.

IV. But what were the contents of Clark's will of 1813? Did
562 it acknowledge Myra as his legitimate daughter, and, as such, make her the universal legatee? Could the probate be maintained, even were these dispositions contained in the will?

It is clear, and I take it as shown that Clark, moved by paternal affection, not only intended to make provision for Myra, but actually carried out that intention, besides leaving undisturbed the confidential trusts he had previously executed for her benefit; but if the will really made did not, or could not, contain the acknowledgment that she was his legitimate child, then the will probated should not remain so, for it contains such an acknowledgment, and would not therefore be a true version.

Before coming to the facts which relate to this branch of the
563 case, it is necessary to state the law which is applied to them.

As the law stood in 1813, (see code 1808, p. 212, art. 20, and p. 210, art. 14,) where a man died leaving no legitimate child, but a natural one, and the father or mother of the decedent survived him, he could not leave the natural child more than one-third of his estate.

The surviving father or mother of the decedent was his forced heir, for two-thirds, and the testator could make no disposition in fraud of this right. By art. 46, p. 156, and art. 15, p. 212, it is declared that bastard, adulterous, and incestuous children, even duly acknowledged, shall not enjoy the right of inheriting from their natural father or mother, the law allowing them nothing more than a mere alimony. By art. 17, page 212, every disposition in favor of a person incapable of receiving shall be null, whether it be distinguished or not. See
564 also art. 4, p. 44, and art. 7, same page.

The law considers the husband of the mother the father of all the children conceived during the marriage. The law admits neither the exception of the wife's adultery nor the allegations of the husband's natural or accidental impotency. Adulterous bastards are those who are born from an unlawful connection between two parties, who, at the time when the child was conceived, were either of them or both connected by marriage with another person. Articles 1, 2, 3, & 4, p. 44, and articles 17 & 18, p. 46; article 25, p. 48; articles 29, 30, & seq., p. 50, provide that children are either legitimate or illegitimate; that legitimate children are those born during the marriage; that illegitimate children are those who are born out of marriage; that bastards are those born from persons to whose
565 marriage there existed a legal impediment; that the legitimate filiation of children born of a lawful marriage, but whose condition has been suppressed, may prove that legitimate filiation by written or oral evidence; that the acknowledgment of an illegitimate child shall be made by a declaration executed by a notary public, in presence of two witnesses, but if there is no such acknowledgment, the paternity may be proved by private writings, oral admissions, or the fact of open concubinage.

The kind of evidence which may be admitted of each species of filiation is the same with regard to both; the difference is that in one case the evidence is coupled with proof of a marriage existing between the father and mother at the time of conception; but in the other
566 case a natural child, to be recognized as such, need not, of course, produce such evidence of marriage between its parents.

There were formerly laws in force in the colony of Louisiana authorizing, in certain cases and by certain forms, the recognition of natural children as legitimate, (see 1st vol. Moreau & Carleton's Partidas, p. 551; Laws, 6, 7, & 8; Tit. 5, Partida 4;) but these being inconsistent with the code of 1808, were necessarily repealed. Even were they not repealed, none of them would be applicable to this case.

Mrs. Myra Gaines was the child of Zulime Carrière, and was conceived during the marriage with Jerome Desgrange.

Daniel Clark, who was Myra's father, could not legally marry her mother, and in fact did not do so either legally or illegally.

From these two facts it follows that Clark could not lawfully
567 acknowledge her as his legitimate daughter; could not leave her his estate as to a legitimate descendant; could not make her his universal legatee in fraud of his surviving mother's right, as forced heir to two-thirds of his estate; could not leave her more than one-third; and if he did so in his will, it would pro tanto be absolutely null and void, as contrary to public policy and to prohibitory law.

Several witnesses have nevertheless testified that they saw and read the acknowledgment and universal legacy in the will of 1813, or that they heard Clark declare he had made a will to that effect, &c., &c.

When we consider the affection Clark evinced for Myra, his statements to Mazureau, Miller, & others, as well as to Samuel B. Davis and
568 others, it is not to be doubted that his will contained at least the most advantageous dispositions he could lawfully make in her favor. If it were merely contended that it contained a clause acknowledging her as his illegitimate daughter, and making her his universal legatee, saving the legitime of his mother, I would not hesitate to respond affirmatively to the proposition. His previous will, giving his mother all, the great tenderness and regard he always showed that mother, the tenor of his correspondence with her and his sister, and many other circumstances, would confirm the opini n that such were the contents of the will of 1813.

Clark knew the laws of Louisiana; he knew that a will acknowledging Myra as legitimate would be a fraud on his mother, condemned
569 by prohibitory articles of the code; he had actually been instructed by his able counsel that he could not make Myra his universal legatee, and assented to the correctness of the opinion. The counsel he consulted even went so far as to advise him that he could not even acknowledge her, under the code of 1808, as his natural or illegitimate daughter; but on this point there is ground for a different opinion, which no doubt Clark finally adopted. He guarded against a mistake in this respect. Clark's highmindedness, sensitiveness to public opinion, care for the world's respect, family pride, and the like, which has been so much insisted upon, as well as his s'perior learning & intellect, repel the opinion that he would vainly, foolishly, and culpably
570 attempt to do injustice to his mother when he loved and respected her with all his heart.

What is there in the way of a solution of the case in this sense? The testimony of two other witnesses who appear intensely satisfied, that the will they saw and read, or the contents of which were told them by Clark, more than twenty years before the time they gave their testimony, contained not the word illegitimate but the word legitimate, in the description of Myra as the testator's daughter; and that he left her not merely all he could give her but all his estate. Is it not possible the witnesses were mistaken; and even may not their imagination and conversation have contributed to fix one version instead of the other in their minds? A critical examination of several depositions would
571 show discrepancies sufficient to raise doubts. They have made mistakes on matters which they ought to have remembered correctly. They do not always give exactly the same statements. They differ in respect to other dispositions of the will. May they not have fallen into error on the point regarding the word "legitimate" as well as others? Their testimony shows a proneness to resort to gossip and other hearsay. They evidently give way a great deal to sentiment. They certainly were too ready to swear that Desgrange had been convicted of bigamy and other particulars of less importance. Yet an inmense estate is put at stake upon the exactness of their recollection.

Thus on one side there is a positive law, imperative prohibi-
572 tions, duty to a mother, duty to the State and society, a talented and honest man, who knew what he could do, as also the course, duty, and law pointed out, and there is a moral necessity for concluding that he did conform to these. On the other hand, there is the

testimony just referred to, and the great improbability of the fa't it relates.

On this issue I must decide the fact acccording to the rules by which human action is commonly governed. I must decide, rather, that Clark acted according to his own character, enlight'ment, and the law, than otherwise. That he may not have done so is humanly possible. He may have acted in an illegal and extraordinary manner. The world is sometimes startled by irrefragable proof of strong derilictions and
573 aberrations. In such cases, however, there is a familiar principle which is always applied, viz: that in human matters the more extraordinary and improbable the act alleged, the stronger must be the evidence to establish it as a fact. It must be a clear case, and this far from being so. The evidence is weak in proportion of the improba'lity.

To use the words of Justice Greier, of the Supreme Court of the United States, at page 631 of 24th Howard's Reports, this case is an history "of scandalous gossip, which was buried under the dust of half a century, and which a proper feeling of delicacy should have suffered to remain so. I therefore dismiss the case, I hope, for the last time, with the single remark that if it be the law of Louisiana that a will can be established by the dim recoliections, imaginations, or inven-
574 tions of anile gossips after forty-five years to disturb the titles and possessions of bona-fide purchasers, without notice, of apparently indefeasible legal title, haud equidem invideo, miror magis."

I decide that Clark could not, and did not, make the probated will, and that the probate must be annulled.

V. There are exceptions filed in this case which I think should be overruled.

The prescription of five years does not apply to cure an absolute nullity, such as results from a violation of public policy and prohibitive law.

The status of Mrs. Gaines, if, indeed, she has acquired one, cannot interfere with the examination and decision in this case. For that status, if it can be so called, was the result of the probate, against the nullity of which, for the causes alleged, there is no prescription,
575 and the Supreme Court of the United States have expressly referred parties, whose cases are yet undecided, to this court to contest the probate if they so desired. By the law of Louisiana and the express decision of our supreme court, a party may always impeach a will set up against him as a muniment of title. This right of defense is perpetual, and no length of enjoyment of other property than that claimed from the defendant can bar the contestation. Besides this, the Supreme Court of the United has decided on this question of status, independently of the will of 1813, against Mrs. Gaines. When there are contrary decisions, no indisputable status is settled under them.

The plea of res judicata is not tenable. I have previously, in a lengthy opinion, examined and decided this question. The Supreme
576 Court of the United have expressly refused to pass upon the matters at issue herein.

The interest of the plaintiffs is sufficiently shown by the pleadings in the cases instituted against them by the defendant in the circuit court of the United States, and which cases are still pending.

It is therefore ordered, adjudged, and decreed that the will purporting to be the will of Daniel Clark, and to be dated July 13th, 1813, as set forth in the petition and suit filed by Myra Clark Gaines, on 18th January, 1855, in the record and matter of the succession of said Daniel Clark, No. 8646 of the docket of the second district court of New

Orleans, be revoked and declared invalid, and that the probate thereof, as obtained on said petition, be annulled, and recalled as *as* abso-
577 lutely null and of no effect.

It is further ordered that the defendant be condemned to pay the costs of this suit.

Rule for a new trial.—Filed Dec. 7th, 1871.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. } No. 32979.
vs.
MYRA C. GAINES. }

On motion of Race, Foster & E. T. Merrick, Fellows & Mills, attorneys for defendant:

It is ordered that plaintiffs and intervenors in this case show cause on Saturday, 16th December, 1871, at 12 o'clock m., why a new trial should not be granted in this cause on the grounds that the judgment rendered herein is contrary to law and evidence; that the court erred in not sustaining the exception & plea of res judicata & of
578 prescription, and further, because the record contains no proof of the said plaintiffs and intervenors holding title under the succession of Daniel Clark. There was error in determining that there was no legal marriage between Daniel Clark and Zulime Carriére; in deciding that Jerome Desgrange was not guilty of bigamy in marrying said Zulime Carrière; in deciding that the testimony of the witness, Benguerelle, is unworthy of belief; in determining that the question of status of the defendant had not previously been fully adjudicated upon and in favor of defendant, and was res judicata, and that this court has any jurisdiction of said question or of this suit; in deciding that the will admitted by the court to have been executed by Daniel Clark
579 subsequent to the will of 1811, did not recognize defendant as his legitimate child and universal legatee; and because in all other respects the said judgment is contrary to law & evidence.

Sheriff's return on rule for a new trial.

Received December 7th, 1871, and on the 8th day of December, 1871, I served copies of the within rule on J. McConnell, esq., J. Dirrhammer, esq., & J. D. Hill, esq., all personally.

Returned same day.

(Signed) J. A. GANDOLFI,
D'y Sheriff.

I was credibly informed by Mr. King that W. A. Elmore, esq., was in Canada; I therefore make my return out of city.

(Signed) J. A. GANDOLFI,
D'y Sheriff.

580 *Order rules submitted as entered in the minutes of December 16th*, 1871.

Second district court for the parish of Orleans, Hon. T. W. Collens presiding.

JOS. FUENTES & AL. } No. 32979.
vs.
MYRA C. GAINES. }

The rule taken Dec. 7th, 1871, & made returnable this day, being

called, appeared, Fellows & Mills for plff. in rule, J. McConnell for deft. therein; when, after hearing argument of counsel, the court took the matter under advisement.

Bill in equity.—Filed Dec., 1871, *nunc pro tunc, in accordance with agreement of September 26th*, 1871, *by plaintiffs.*

United States circuit court, sixth circuit, & eastern district La., in equity.

581 MYRA CLARK GAINES
versus
P. H. MONSSEAUX ET ALS.

H. D. Stone, solicitor for complainant.

To the honorable the judges of the United States circuit court, sixth circuit and eastern district of Louisiana, sitting in equity:

Myra Clark Gaines, a citizen of the State of New York, residing in Brooklyn, in said State, brings this her bill in equity, against the following defendants, each of whom is a citizen of the State of Louisiana, and residing in said eastern district thereof, to wit:

P. H. Monsseaux, A. D. Doriocourt, Jules Lapière alias Lapère, W. T. Vredenburg, N. Rilleux, J. G. Pelhofer, W. Laurans, Henry
582 Spitzefaden, Jules Beauduc, Joseph Bermond, Jaques Philippe Moreau, Wid. Auguste Lanusse, John Brietry, F. Gabriel Levasseur, Stanislas Weber, J. T. D. Lefebre, Marcelin Esnard, J. B. Robertson, Wid. M. Gurbarsche, Barthelemy Moreno, Nancy Villars, Lilette Bonenguier alias Bonseigneur, F. M. Jacobs, Marcelin Bethencourt, Wid. Raymond Losuel, Wm. Moran, Michael Milleur, jr., P. Avril, Owen Doherty, Margaret McLaughlin, Wid. J. C. De St. Romes, Louis Arou, Joseph Desplaux, Geo. Lohr, Peter Mulier alias
583 Muller, François Lacroix, Joseph Diard, Albin Rochereau, Jacob Newhouser, Raymond Rousselot, D. B. Macarty, Wid. B. Duracker, Joseph Dangel, John Despaux, Jno. Augustus Blacksmith, Henry Peter, Joseph Bazanac, Ferdinand Thomson alias Thompson, Joseph Abadie, Martin Gruff, Etienne Parsscell, J. M. Tourné, C. Morel, Geo. Binschop alias Geo. Bischoff, Auguste Gauthier, W. H. McLean, L. J. E. Mace, Albin Soulié, Joseph Hernandez, Mex. M. Agelasto, Augustus St. Amant, Julia Dumant, Wid. Pierre Cap, John Pember-
584 ton, Jose Sabates, Louis Burnett, Dennis Cronan, Francis Mouny, Robert J. Kerr, Isidore Eugene Prinsard, Josephine Hoa, Joseph Guillot, Henri Larqui, Florville Foy, McDonough School Fund, Simon Edward Brunett, J. B. Muilhe alias Mailhe, Victorine Demomelle, Felix A. Ducross, David Stickney, Pierre Minville, Joseph Fumegano, Fulcrom Randon, J. P. Perez, Barthelemy Morrisco, J. B. Jacquet, Jules Bermudez, P. Avegno, jr., Jules Lavergne, Joseph Oscar Theard, Nictor Ceressales, M. Theval alias Cheval, A. Cu-
585 bicke, Amice Gautier, Joseph Dubuc, J. F. Bigot, J. F. B. Courbet, Joseph Fuentes, Pierre Lamarbre, R. Devoe, L. Attenet, J. Dupasse, Adele Monquin, Theodore Guyol, John L. Gubernator, J. P. Siffrent, Jean Allie, Wid. J. Juliet Keny alias Reny, Geo. Oscar Reinecke, Henry Parlange, François Roumien, John Johnson, Louis E. Nie, Arthur B. Griswold, John and Jas. C. Davidson, John Hoey, B. Abadié, A. Boeto; Maria M. Doricourt, tutrix of Maria Doriocourt, a minor; Joseph Doricourt, Francis Doriocourt, André Dorio-
586 court, Aimée Rousseau, Alfred Rousseau, testamentary executor of the will of Roudolphe Rousseau; V. Bouligny, Mary Bouligny,

his wife, Antoine Fabre Nicolin, curator of the succession of Chas. Selinger; Bernard Avegno, testamentary executor of the estate of P. Avegno; Mrs. Pierre Oscar Peyroux and her husband, whose name is to your oratrix unknown; Mrs. Frances Joseph Dauduc and her husband, whose name is to your oratrix unknown; Mrs. Pauline Brietry & her husband, whose name is to your oratrix unknown; Mrs. J. B. Marmsout & her husband, whose name is to your oratrix unknown; Mrs. Ellen Phillips & her husband, whose name is to oratrix unknown; Mrs Celina Barant, alias Revenat & her husband, whose name is to your oratrix
587 unknown; Mrs. Bazanac & her husband, whose name is to your oratrix unknown; Mrs. Celina Magner & her husband, whose name is to your oratrix unknown; the Southern Star Manufacturing Company, a corporation established by the laws of Louisiana & doing business in New Orleans; Mrs. Charles Havenard & her husband, whose name is unknown to your oratrix; Mrs. Jeremiah Scanlon & her husband, whose name is to your oratrix unknown; Mrs. Henry St. Paul & her husband, whose name is your oratrix unknown; Emma L. Walton & her husband, whose name is to your oratrix unknown; Mrs. Stephen Morel & her husband, whose name is to your oratrix unknown; Mrs. Simeon Delord & her husband, whose name is to your ora-
588 trix unknown; Mrs. Jean Sauvage & her husband, whose name is to your oratrix unknown; the Canal Carondelet Navigation Company, a corporation established by the laws of Louisiana & doing business in New Orleans; the Hope Insurance Company, a corporation established by the laws of Louisiana & doing business in New Orleans; Antoine Sarrat, Minor Kenner; Eliza Davis Kenner, administratrix of the estate of Minor Kenner, and tutrix of Daniel Kenner, Maria Kenner, Orley Kenner, her minor children; Willis P. Coleman, E. Palmyra White, De Prieur White, Geo. White, Athie White, Octavia White, N. P. Fisher and his wife; P. Angrain & his wife; S. Howell and his wife; H. D. Hopkins and his wife; John M. Brown, C. W. Hopkins, Mrs. Vance & her husband, J. G. Reiser, Jules Bermudez, Jules Lapiere, Louis Benocke, Dennis Cronan, J. B. Patrick, Martin Soye; Mrs.
589 Saliba, administratrix of the estate of Joseph Saliba; A. Miltenberger, J. A. Blanc, W. Hogan, Edward Barnet, George Geissir, alias Giseler, heirs of H. Levergne; F. Hubert, John Sabie alias Sable, Michael Lorenz, Jean Cazeneau, Alphonse Drez, Armand Bauzane, Louis Mestier, Pangrere Wicker, John Miller, Henry Lorenz, Michael Dennis, Henry Grandment, Charles Petrie, Miss M. A. Levassier; the Ponchartrain Railroad Company, a corporation established by the laws of Louisiana, & doing business in the City of New Orleans; The City of New Orleans, a corporation established by the laws of Louisiana.

Also, against the heirs of Paul Pesquir, who are aliens, residing in the kingdom of France, and whose names are unknown to your oratrix, but who are represented by P. Cazanave, their agent & attorney, who resides in the eastern district of Louisiana aforesaid, and Teresa
590 Pene Massana, an alien, who resides in the kingdom of Spain, who has an agent and attorney, to wit, Oscar Alex, who resides in Louisiana, in the city of New Orleans, and is a citizen of said State in said eastern district.

And thereupon your oratrix complains and says that Daniel Clark, late of the city of New Orleans, in the State of Louisiana, at the time of his death, being seized in fee simple, and lawfully possessed of certain lands and negro slaves, rights, credits, and other property of great value, did, on or about the 13th day of July, in the year eighteen hundred & thirteen, (1813,) duly make, execute, and publish his last will

and testament in writing; and thereupon, amongst other things, acknowledged your oratrix to be his legitimate and only child, and bequeathed to her all the estate, whether real or personal, of which
591 he might be possessed, subject only to the payment of certain legacies thereinafter named; and that the said testator did, in and by his last will and testament, constitute and appoint François Dusuau Delacroix, James Pitot, and Joseph D. D. Bellechasse, executors thereof, and did also appoint and constitute the said Delacroix tutor to your oratrix; and that the said testator departed this life on or about the sixteenth day of August, in the year 1813, not having revoked or annulled the said will and testament, or the provisions therein, for the benefit of your oratrix as aforesaid, but leaving the said will, and every part and portion thereof, in full force and effect. And after the death of the said testator, to wit, on or about the eighteenth day of January, 1855, your oratrix applied to the second district court
592 of New Orleans (the court having jurisdiction of such matters) for the probate of the said will; that upon the hearing of the application of your oratrix, the said court rejected the same; that afterwards, in due time, the said cause was appealed to the supreme court of the State of Louisiana; whereupon, after due proceedings, the said supreme court reversed the judgment of the said second district court, and, proceeding to render such judgment as should have been rendered by the lower court, ordered, adjudged, and decreed, that the said will of Daniel Clark, dated July 13th, 1813, as set forth in the petition of your oratrix, be recognized as his last will & testament, and that it be received, recorded, and executed as such; that, on the 23rd day of February, 1856, the mandate of the said supreme court was filed & recorded in
593 the said second district court, and the said will was duly recorded in the book of wills of said court, on the 23rd day of February, 1856, in book 10, p. 307; all of which will more fully appear from a copy of said will, and the probate thereof, as follows:

"STATE OF LOUISIANA,
"*Second District Court of New Orleans:*

"Succession of Daniel Clark.

"ON THE APPLICATION OF MRS. MYRA CLARK Gaines for the proof of the will of Daniel Clark. } No. 8646.

"*Petition.*

"Filed 18th Jan'y, 1855.
(Signed) "OCTAVE MOREL, *D'y Clk.*

"To the honorable the second district court of New Orleans:

"The petition of Myra Clark Gaines, who resides in the city & State of New York, respectfully represents: That on the 16th day of August, A D. 1813, Daniel Clark, then residing in New Orleans, departed this life, leaving no descendants except your petitioner, who is the daughter of said deceased.

594 "That on the 13th day of July, 1813, the said Daniel Clark made his last will, which was in substance and to the effect following:

"'NEW ORLEANS, *July 13th*, 1813.

"'In the name of God, amen: I, Daniel Clark, of New Orleans, do make this my last will and testament:

"'Imprimis. I order that all my just debts be paid.

"'Second. I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payments of certain legacies hereinafter named.

"'Third. It is my desire that my friend Chevalier Francois Dusuan Delacroix shall have the charge of my said daughter Myra, and I
595 do appoint & constitute him tutor to her.

"'Fourth. I give and bequeath unto my mother, Mary Clark, now or recently of Germantown, in the State of Pennsylvania, an annuity of two thousand dollars, which is to be paid out of my estate during her life. I further give and bequeath an annuity of five hundred dollars to Caroline Desgrange until she arrives at the age of majority; after which I give and bequeath to her a legacy of five thousand dollars.

"'Fifth. I hereby nominate and appoint my friends Francois Dusuan Delacroix, James Pitot, and Joseph D. D. Bellechasse my executors, with full power to execute this my last will, and to settle everything relating to my estate.'

"Petitioner further avers that the said will contained other legacies and dispositions; that said testator gave a legacy of $5,000.00 to
596 a son of said Pitot, and another of $5,000.00 to a son of Mr. DeBuys, both of New Orleans. He also provided for the freedom & maintenance of his slave Lubin. In his said will the said Clark made an inventory of his estate, with explanations of his business relations, and gave instructions to the said tutor, Delacroix, in regard to the education of your petitioner.

"She further represents that the said will was an olographic one wholly written, dated, and signed by the testator, in his proper handwriting, and at the death of the said Clark was left among his papers at his residence. That after his decease, diligent search was made for said will, but the same could not be found, nor has it been since, and it was either mislaid, lost, or destroyed; that the destruction of said will has prevented her from giving the contents thereof with any
597 greater certainty than as set forth herein above.

Petitioner further shows that Messrs. Bellechasse & Pitot, two of the above-named executors, are dead, that the said Delacroix, the other, is indisposed to accept the executorship of the said will, and that no presumptive heirs of said Clark reside in this State.

"She further shows that, at the decease of said Clark, and for many years after, she was a minor, wholly ignorant of her rights under said will, and that after she arrived at the age of majority, and was made acquainted with the matters aforesaid, she instituted a suit, on the 18th June, 1834, in the probate court of New Orleans, for the purpose of proving the said will, but the said suit was dismissed, as in case of non-suit, on the 8th day of June, 1836, without any fault of your petitioner.

598 "That in the year 1836, she instituted suit by bill in chancery, in the circuit court of the United States for the eastern district of Louisiana, to set up the said will and enforce her rights as universal legatee under the same; but that the Supreme Court of the United States dismissed her claims under the said will, as in case of non-suit, without deciding on the merits of the cause, and without the fault of your petitioner.

"Wherefore she prays that this hon. court would fix a day, place, and

hour for the proof of the said will, and after all due proceedings such as the law requires, that the same may be recorded and its execution ordered, and for general relief; and she will ever pray, &c.

(Signed) " P. E. BONFORD,
" SMILEY & PERIN,
" MOISE & RANDOLPH,
599 " *Att'ys for Petitioners.*

" *Order.*

" Let the will within referred to be proved before me, on Saturday, the 27th day of Jan'y, 1855, at 10 o'c'k a. m.

(Signed) " J. N. LEA, *Judge.*

" *Decree of the supreme court of the State of Louisiana.*

" MONDAY, *December 17th*, 1855.

" It is therefore ordered, adjudged, and decreed by the court that the judgment of the lower court be avoided and reversed, and proceedings to render such judgment as should have been rendered in the lower court.

" It is ordered, adjudged, & decreed that the will of Daniel Clark, dated 'New Orleans, July thirteenth, eighteen hundred and thirteen,' as set forth in the plaintiff's petition, be recognized as his last will & testament, and the same is ordered to be recorded and executed
600 as such; and it is further ordered and decreed that François Dusuan Delacroix be confirmed as testamentary executor of said last will and testament, and that letters testamentary issue to the said Delacroix, and the costs of this proceeding be borne by the succession.

" A true copy.
" Clerk's office, New Orleans, Feb'y 26, 1856.

(Signed) " EUGENE LASSÈRE, *Clerk.*

" *Decree of the supreme court of the State of Louisiana.*

" MONDAY, *Feb'y 18th*, 1856.

" It is therefore ordered, adjudged, and decreed that the judgment heretofore pronounced by us in this case be amended, by adding to the same words 'reserving to said Richard Relf the right, if any he have, to oppose said will in any manner allowed by law, as fully as he could have done had not he been a party to these proceedings.'

" A true copy.
601 " New Orleans, Feb'y 23rd, 1856.

(Signed) " EUGENE LASSÈRE, *Clerk.*"

And your oratrix further showeth unto your honors that the whole estate of the said Daniel Clark, by the laws of the State of Louisiana and in pursuance of the said last will, vested in your oratrix on the death of the said testator, subject only to the payment of the debts & specific legacies contained in said last will & testament; that the said defendants, on or about the day of , in the year 1819, after the death of the said Daniel Clark and while your oratrix was a minor, took possession of, and have ever since held and retained, for their own use and benefit, the following property of the said Daniel Clark, bequeathed to your oratrix as aforesaid, with the buildings and improve-

602 ments thereon, and have enjoyed the rents and profits of the same ever since; that is to say—

1st. A lot of ground in the city of New Orleans, in the square bounded by Circus, Perdido, Philippi, and Poydras, as Poydras street was in 1835, being about ten feet wide and about 191 feet long on Poydras street, being the same land sold by the Carrollton Railroad Company to Municipality No. 2, by act before Joseph B. Marks, notary public, September 14th, 1836, now claimed by the city of New Orleans.

2d. A lot of ground, with all the buildings thereon, in the city of New Orleans, in the square bounded by Burgundy, St. Peter, Rampart, & Toulouse, being the lot about 60 feet on Toulouse and 120 feet deep, which lays next to lot No. 1, towards Ramparts street, as by plan of Carlos Trudeau, dated Jan'y 11th, 1801, deposited in the office of
603 P. Pedesclaux, and being next to the lot of E. H. Lameyer, conveyed to Daniel Clark aforesaid by James Pitot, by act before P. Pedesclaux, February 24th, 1813, now claimed by Antoine Sarrat.

3rd. One valuable plantation, parcel, or tract of land, situated at Kennerville, so called, in the State of Louisiana, about five leagues above the city of New Orleans, on the left bank of the river Mississippi, bounded on the upper side by lands owned in October, 1813, by Wm. Kenner, and extending in front on the Mississippi River 18½ arpents, and on the lower side bounded by lands owned in October, 1813, by Jaques Forter, and extending in the rear, on both sides, to Lake Ponchartrain, with all the improvements thereon, having been purchased by Daniel Clark aforesaid from Stephen Henderson, for $120,000.00, now claimed by the widow & heirs of Minor Kenner, & Willis P. Coleman, and others.

604 4th. A certain tract of land, containing about 135 acres, more or less, situated in the quarter of the Bayou St. John, in the city of New Orleans, with all the buildings & improvements thereon, bounded by the canal Carondelet, Dorgenois street, Bellechasse street, by land that, in 1821, was owned by Mrs. Henry and Evaraŕiste Blanc, and by the Bayou St. John, according to a plan of said land drawn by Joseph Pilié, dated August 20, 1821, annexed to an act of sale of said tract, made by Richard Relf and Beverly Chew, as executors of Daniel Clark, to Evaristie Blanc, and passed before Philip Pedesclaux October 30, 1821, now of record in said Pedesclaux's notarial records, said land having been acquired by the said Daniel Clark, in his life-time, from Nicholas Marin Vidal, by act before C. Ximenes or P. Pedesclaux, notary public, on or about July 24, 1804, now claimed by
605 P. H. Monsseaux, David Stickney, Wid. B. Duracher, Jules Lapierre, alias Lapene, Joseph Daugel, W. F. Vredenburg, Fulcrom Random, John Augustus Blacksmith, J. P. Perez, Henry Peter, W. Laurans, J. B. Jacquet, Ferdinand Tomson alias Thompon, Jules Bermudez, Joseph Aleidie, Joseph Bermond, Jules Lavergne, Etiene Parsscell, Wid. Aug. Laniesse, Victor Cerressales, C. Morel, F. Gabriel Lavessear, Geo. Binschopp alias Geo. Bishop, Aimee Gautier, J. T. D. Lefebre, Joseph Dubuc, W. H. McLean, J. B. Robertson, D. B. Macarty, A. D. Doriocourt, Pierre Minville, Jos. Fumegano, John Despaux, N. Rillieux, J. G. Pelhofer, Barthelemy Morisco, Jos. Bazanac, Henry Spitzefaden, Jules Beauduc, P. Avegno, jr., Martin Gruff, Jaques P. Moreau, Jos. Oscar Theard, J. M. Tourné, John Bretry, A. Cubicke, Stanislas Weber, Auguste Gautier, Marcelin Esnard, J. F. Bizot, L. J. Mace, J.
606 F. B. Courbet, Albin Soulié, Barthelemy Moreno, Pierre Lamabre, Alex. M. Agelusto, Lilette Boneuguier alias Bonseigneur, Augustus St. Amant, F. M. Jacobs, J. Dupasse, Wid. Prre. Caps, Wid. Ray-

mond Loseul, Theodore Guyol, Jose Sabatis, Michael Meilleur, jr., J. P. Siffrent, Dennis Cronan, Owen Doherty, Widow J. Juliet Keny alias Reny, Wid. J. C. De St. Romes, Geo. Oscar Reinecke, Josephine Hoa, Joseph Despaux, Francois Roumieu, Henry Larquei, Peter Mulier alias Muller, Louis E. Nie, McDonough School Fund, Arthur B. Griswold, Wid. M. Gubarsche, Joseph Fuentes, Jos. Hernandez, Nancy Villars, R. Devoe, L. Attenet, Julian Dumant, Marcalin Bethencourt, Adele Morquin, John Pemberton, Wm. Moran, John L. Gubernator, Louis Barnett, P. Avril, Jean Allie, Francis Mouny, Isidore E. Pinsard, Louis Aron, Henry Parlange, Jos. Guilot, Geo. Lohr, John Johnson, F.
607 Foy, François Lacroix, Joseph Diard, Simon Edward Brunett, John and James C. Davidson, Albin Rochereau, John Hoey, J. B. Muilhe, alias Mailhe, Jacob Newhouser, Victorinne Demomèlle, B. Abadie, Raymond Rousselot, Felix A. Ducros, A. Boeto, Maria M. Doriocourt, tutrix of Maria Dariocourt, a minor; Joseph Doriocurt, Francis Doriocourt, Andre Doriocourt, Aimee Rousseau, Alfred Rousseau, testamentary executor of the will of Rodolphe Rousseau; V. Bouligny, Mary Bouligny, his wife; Antonie Fabre Nicolin, curator of the succession of Charles Selinger; Bernard Avegno, testamentary executor of the estate of P. Avegno; Mrs. Pierre Oscar Peyroux, & her husband, whose name is to your oratrix unknown; Mrs. Francis Jos. Bandue, & her husband, whose name is to your oratrix unknown; Mrs. Pauline Brietry & her husband, whose name is to your oratrix unknown;
608 Mr'. J. B. Marinsout, & her husband, whose name is to your oratrix unknown; Mrs. Ellen Philips, & her husband, whose name is to your oratrix unknown; Mrs. Celina Barant alias Ravenat and her husband, whose name to your oratrix is unknown; Mrs. Bazanac & her husband whose name to you oratrix is unknown; Mrs. Selina Magner & her husband, whose name is to your oratrix unknown; The Southern Manufacturing Company, a corporation established by the laws of Louisiana, & doing business in New Orleans; Mrs. Charles Havenard, & her husband, whose name is to your oratrix unknown; Mrs. Jeremiah Scanlon, & her husband, whose name is to your oratrix unknown; Mrs. Henry St. Paul, & her husband, whose name is to your oratrix unknown; Emma L. Walton, & her husband, whose name is to your oratrix
609 unknown; Mrs. Septima Morel, & her husband, whose name is to your oratrix unknown; Mrs. Simeon Delord, & her husband, whose name is to your oratrix unknown; Mrs. Jean Sauvage & her husband, whose name is to your oratrix unknown; The Canal Carondelet Navigation Company, a corporation established by the laws of Louisiana, and doing business in New Orleans; The Hope Insurance Company, a corporation established by the laws of Louisiana, & doing business in New Orleans.

5th. A lot of ground in the city of New Orleans, on Royal street, between St. Peter and Toulouse street, being No. 184 and 186, in 1840, on said street, and being the same described in the will of Rene Le Monier, book 6, page 421, in the records of wills for the parish of Orleans,
610 being the same conveyed to Daniel Clark aforesaid, by James Pitot, by act before P. Pedesclaux, February 24, 1813, being 30 feet on Royal street and 120 feet deep, and bounded, in 1813, on one side by land of Madame Wid. Lanties, and on the other by land of Messrs. Grandchamp & Monier, now claimed by Palmyra White & her children.

6th. A tract of land, with all the improvements thereon, situated in the parish of Ascension, State of Louisiana, on the left bank of the Mississippi, 18½ arpents in front on the Mississippi and extend' back 40

arpents, purchased by Daniel Clark aforesaid of Wm. Simpson, June 5th, 1812, by act before P. Pedesclaux, and bounded, in 1816, by lands of Beverly Chew and Richard Relf, on the lower side, and on the upper side by lands of Stephen Henderson and G. W. Destrahan, now claimed by John M. Brown.

611 7th. A square of ground in the city of New Orleans, bounded by Circus, Perdido, Phillippi, & Poydras streets, now claimed by the heirs of Paul Pesquer & Teresa Pena Massana.

8th. A tract or parcel of land on the Gentilly road, in the city of New Orleans, lying between the Gentilly road, the Canal Marigny, Treasure, and both sides of Spain street, being about 22 arpents front on Gentilly, as by plan of Allon D. Demicourt, dated April 21, 1856, now in the office of H. D. Stone, No. 18 Royal street, New Orleans, now claimed by C. W. Hopkins, Mrs. Vance and her husband; J. G. Reiser, Jules Bermudez, Jules Lapiere, Louis Benocke, Dennis Cronan, J. B. Patrick, Martin Soye, Mrs. Saliba, admx. of the estate of Joseph Saliba; A. Miltenberger, J. A. Blanc, W. Hogan, Edward Barnett;

612 George Griser alias Giseler, heirs of H. Lavergne; P. Hubert, John Sabie alias Sable, Michael Lorentz, Jean Cazenean, Alphonse Drez, Armand Bauzane, Louis Mestier, Paugrere Wicker, John Miller, Henry Lorenz, Michael Dennis, Henry Grandmont, Chas. Petrie, Miss M. A. Levassier, The Ponchartrain Railroad Company, a corporation established by the laws of Louisiana, and doing business in the city of New Orleans; the city of New Orleans, a corporation established by the laws of Louisiana.

And your oratrix further shows that the particular portions and lots of said land, so taken possession of and claimed by said defendants separately, the time when each took possession of the same, the title and claim of title by which each pretends to hold, the date from which they have received rents & revenues from the same, and the annual

613 amounts of such rents and revenues, are unknown to your oratrix; that the facts touching all these matters are material to the case of your oratrix, and that the discovery of them by each of said defendants is indispensible as proof.

And your oratrix further shows that said Daniel Clark made a *provision* will in the year 1811, in which he made his mother, Mary Clark, his universal legatee, and one Richard Relf and Beverly Chew his executors; that said will of 1811 was probated in the city of New Orleans, and the said Chew & Relf qualified as executors; that will of 1811 was revoked by the aforesaid will of 1813; that said Chew has departed this life, and all the rights & duties of said Relf as executors have expired; that said Mary Clark, the universal legatee under the will of 1811, departed this life many years since, and all her heirs and legatees

614 reside without the jurisdiction of this hon. court.

That James Pitot & D. D. Bellechasse, named as executors in the said will of 1813, departed this life before the probate thereof; that Francois Dussau Delacroix, the other executor, refused to qualify as executor under said will of 1813, and is now dead, and there is now no qualified or acting executor, administrator, or curator of said Daniel Clark.

And your oratrix further showeth that she has several times applied to the said defendants to deliver to her the said property, and account for the rents and revenues of the same, and your oratrix had well hoped that said defendants would have complied therewith, as in equity and good conscience they ought to have done.

615 But now so it is, may it please your honors, the said defendants,

to injure and oppress your oratrix, now absolutely refuse to deliver said property to your oratrix, or to pay or account to her for the rents and revenues of the same, or the interest due thereon; sometimes pretending that one Richard Relf and one Beverly Chew sold said property to the defendants, as testamentary executors of a will of the said Daniel Clark, made in the year 1811, which had been admitted to probate in the probate court for the parish & city of New Orleans, and as attorneys in fact for one Mary Clark, the devisee in said will of 1811 named; and that they, the said defendants, became the purchasers of the said property for a full and valuable consideration and without notice of any revocation or invalidity of said will alleged to have been made by said Daniel Clark in 1811, and in which said Relf and
616 Chew were named executors, and without notice of the rights and claims of any other person than the said Mary Clark to the said estate of the said Daniel Clark or any part thereof; and thereupon the said defendants insist that, although the said will of 1811 may not have been the last will of said Daniel Clark, yet they should not be affected thereby; and that the titles acquired by them under the sales made by the said Relf and Chew are good and proper titles, and cannot be invalidated or disturbed in any manner by the revocation of said will of 1811 by any claim or title your oratrix may have had or now has to said property or any portion thereof. And at other times the said defendants pretended to have acquired title to said property by prescription, and that the right of action of your oratrix is barred by prescription.

617 Whereas your oratrix expressly charges the contrary of all these pretenses to be true, and that neither the said Relf nor Chew was the duly-qualified executor of the said will of 1811 at the time of the said sales, and their term of office as such pretended executors expired previous to the date of any such sales, nor did either of them act legally in their assumed capacities of pretended executors of a will of the said Daniel Clark, and attorneys of the said Mary Clark. Nor did they, or either of them, when acting in both or either of said assumed capacities, observe or comply with the formalities, or adopt the measures, prescribed by law to give any validity or authority to any act or acts done or assumed to be done by them in such assumed capacities of executors or attorneys, in relation to said estate of said Daniel Clark;
618 that a true and faithful inventory, and a just appraisement by two duly appointed and sworn appraisers, of the real and personal estate of the said Daniel Clark had not been made according to law by said Relf or Chew before said sales were made; that proper and legal orders to sell were not obtained by them from the judge authorized to make such order before said sales were made; that the said sales were made by private contract, and not at public sale with legal notice as the law required; that the money paid by the said defendants for said property was not a full and valuable consideration for the same; that the said Mary Clark was not seized of any interest in the said property, nor in the actual possession of any part thereof at the date of her
619 said power of attorney, or at the date of any such sales; that said Relf and Chew had not, nor had either of them, caused themselves or either of them, to be duly recognized by a court of competent authority as the attorney or attorneys of said Mary Clark; that the pretended power of attorney from said Mary Clark to said Relf and Chew was vague and general in its terms, and did not expressly authorize them, or either of them, to sell the property aforesaid, and for this purpose the said power of attorney was void and of no effect;

that all the acts of Relf and Chew in relation to the said sale of the said property to said defendants were, upon the face of the proceedings, in the foregoing and many other respects, illegal, informal, fraudulent, and void by the laws of the State of Louisiana, and so they were
620 necessarily known to be by the said defendants at the time of their pretended purchase of said property; and that the pretended will of 1811 had been revoked by said Daniel Clark, and was of no validity; and that the making and existence of said last will of said Daniel Clark of 1813 were well known to said defendants at the time of their pretended purchases from said Relf and Chew as aforesaid.

And your oratrix charges that, according to the best of her information and belief, she became of age on the 31st December, in the year 1827; that in tender infancy, and before the death of the said Daniel Clark, she was removed from New Orleans to Philadelphia, in the State of Pennsylvania, and was one of the family, and bore the name of, Col. S. B. Davis; that until about the time of her first marriage,
621 to wit, with William W. Whitney, which was about the year 1832, she was kept in ignorance of her history, parentage, rights, and even her name; that on becoming acquainted with her parentage and rights, on or about 18th day of June, 1834, she instituted suit in the probate court of New Orleans, for the purpose of proving said last will of said Daniel Clark, but that said suit was dismissed, as in case of nonsuit, on the 8th day of June, 1836, without any fault of your oratrix; that on the 28th day of July, 1836, your oratrix instituted suit in the district court of the United States for the eastern district of Louisiana, to set up the will of 1813, and to enforce her rights under the same, and as heir at law of the said Daniel Clark, by bill in chancery against these defendants, among others, for this and other property; that the
622 Supreme Court of the United States, in 1844, held that the will of 1813 should be proved in the probate court of the State before any title to property could be set up under it, and her claim as heir at law finally decided against her in April, 1852; and on the 18th day of January, 1855, your oratrix filed her petition to have the said will of 1813 of the said Daniel Clark probated, which was done on the 17th December, 1855, received and recorded in the second district court, as aforesaid, on the 23rd of February, 1856.

And your oratrix expressly charges that in the aforesaid bill in chancery, filed as above stated, July 28, 1836, and in the various supplemental bills and amendments filed thereto, which bill is known as No. 122 upon the docket of this honorable court, the mayor and alder-
623 men of the city of New Orleans, municipality No. 1 of said city, Philip Minor, Geo. Kenner, Duncan Kenner, Raymond Massana, J. F. C. Barabino, Antoine Piernas, and his wife, the New Orleans and Carrollten Railroad and Bank Company, T. H. Petitpain, and one Toledano, Charles Devanco and Elizabeth Nagel, his wife, John Holliday and Maria Holliday, Rene le Monier, F. X. Martin, and J. Hopkins, and all the other persons who were the pretended owners and possessors of said several tracts of land above described, were each and all of them made defendants & duly cited to answer said bill, and did appear and answer said bill in the year A. D. 1836.

And your oratrix expressly charges that, upon the 27th day of March, A. D. 1857, she exhibited her bill in chancery, which was duly filed in this honorable court, and known as No. 2734 upon the docket of
624 said court, against all the owners and possessors of said several tracts of land above described, in which she sought to recover

from them said lands, and that they were duly cited to appear and answer said bill.

And your oratrix expressly charges, that when said suit was finally decided in April, A. D. 1852, thereafter, to wit, upon the 1st day of April, A. D. 1861, she instituted suit to recover all said land severally above described, against all the owners and possessors of said several tracts of land, at that time in the court of the Confederate States, which claimed jurisdiction of said matters, which had usurped the power that of right belonged to this honorable court, and that was the only de-facto court then existing within the territory of the eastern district of Louisiana aforesaid, that all said owners were duly cited, May 1st, 1862, in said suit to appear and answer thereto.

625 And your oratrix expressly charges that, on or about the 1st of May, A. D. 1857, she exhibited in this honorable court her bill in chancery in due form, wherein she sought to recover each parcel of the aforesaid land of all the then owners of said land at the time, which bill was duly filed in said court, and that she verily believed all said defendants, the owners thereof, were duly served with process, and that she learned for the first time, about the 1st of July, 1865, that said defendant had not been so served with process, because, as she was told, she had not provided funds to pay for the service thereof, which she supposed she had done in the hands of her then attorney.

And your oratrix expressly charges, that from the day she first, by accident, learned her parentage, and her rights to the aforesaid

626 land, she has suffered no laches to intervene in her prosecution of he' rights to said lands; but, on the contrary, she has been persistent and diligent, unwearied and unremitting in the prosecution thereof, and devoted thirty-three years of the best portion of her life to obtain what of right and equity to her belongs; that she expended the fortune of her first husband, Wm. Wallace Whitney, about forty thousand dollars, in that pursuit; and when she intermarried with Maj. Gen. Edmond Pendleton Gaines, in the year 1839, he devoted nearly his whole fortune, about one hundred thousand dollars, to assist your oratrix in maintaining her rights to the aforesaid lands, and other property of her father, in addition to the sum of nearly five hundred thousand dollars, for which your oratrix has become liable in her cease-

627 less efforts to accomplish the same end; all of which were, and of necessity must be, well known to these defendants.

And your oratrix expressly charges that the lands aforesaid yield a large annual rent and revenue, which is received by said defendants and appropriated to their own use; that said defendants so mismanage said estate, so neglect to pay taxes legally assessed thereon, and are irresponsible and insolvent to such a degree that there is great danger that your oratrix will be forever deprived of the aforesaid rents and revenues, unless this honorable court shall appoint a receiver to receive said rents and revenues, and manage them under its direction; and your oratrix prays that such receiver be appointed.

And your oratrix alleges that all the above-described lands are of the value of five hundred thousand dollars, and that each particular

628 tract actually claimed and possessed by each defendant is over the value of one thousand dollars.

To the end, thereof, that the said defendants may, if they can, show why your oratrix should not have the relief hereby prayed, and may, upon their corporal oaths, according to the best and utmost of their knowledge, information, remembrance, & belief, full, true, direct, and perfect answer make to the several interrogatories hereinafter num-

bered and set forth, as by the note hereunder written they are required to answer; and that they answer all and singular the matters and charges aforesaid, as fully and particularly in every respect as if the same were here again repeated, and they thereunto particularly interrogated.

That is to say:

Interrogatory 1st. Whether the property mentioned and described in the foregoing bill of complaint was not a part and portion of the estate of the said Daniel Clark, of which he died seized, and left at his death?

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Interrogatory 2d. Whether the said defendants, or either of them, claim to be the owners of, or otherwise interested in, any portion of said property? If yea, to what portion, and by what right, do they claim the ownership of, or any interest in, said property respectively?

Each is required to set forth at length, with metes & bounds, his right, title, and interest to the particular portion of said property claimed by him, with the legal evidence of the title annexed.

Interrogatory 3d. Whether said property, or any part thereof, yields a revenue, and what portion, and what is the amount of such revenue annually; whether derived from rents, or how otherwise; how long have the said defendants, respectively, held possession of, or derived a revenue from, that portion of said property held by each one of them respectively; and what has the annual value of said rents and revenues amounted to, one year with another, since the date of the possession of said property held by them respectively?

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Interrogatory 4th. Whether the defendants, or either of them, have sold or otherwise disposed of any of the property herein above described since the same was held or claimed by the said defendants, or any of them? If yea, what portion, and when, and how, and for what consideration the same was disposed of? And that defendants may be decreed to hold said property as trustees to your oratrix, and to make full discovery of the matters and things herein set forth, and that they may be decreed to deliver up to your oratrix the property hereinbefore named and described, together with the rents and revenues thereof; and that an account be taken of the said rents and revenues from the time the said property was taken possession of by said defendants, with interest thereon, and that said defendants be decreed to pay the same to your oratrix, and that your oratrix may have such further relief, or may have such other relief as the nature of her case shall require, and as shall be agreeable to equity.

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May it please your honors to grant unto your oratrix the writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to said defendants, to wit: P. H. Monsseaux, D. B. Macarty, David Stickney, A. D. Doriocourt, widow B. Duracker, Pierre Minville, Jules Lapiere, alias Lapene, Joseph Dangel, Jos. Fumegano, W. F. Vredenburgh, John Despaux, Fulcrom Randon, N. Rillieux, Jno. Augustus Blacksmith, J. P. Perez, J. G. Pelhofer, Henry Peter, Barthemy Morisco, W. Laurans, Joseph Bazanac, J. B. Jacquet, Henry Spitzefaden, Ferdinand Tomson, alias Thompson, Jules Bermudez, Jules Bauduc, Joseph Abadie, P. Avegno, jr., Joseph Bermond, Martin Gruff, Jules Lavergne, Jaques P. Moreau, Etienne Parsscell, Joseph Oscar Theard, wid. Auguste Lanusse, J. M. Tourné, Victor Cerressales, John Brietry, C. Morel, M. Theral, alias Cheval, F. Gabriel Levasseur, Geo. Prinschop, alias Geo. Bischoff, A. Cubicke, Stanislaus Weber, Aimée Gautier, J. T. D. Lefebre, Auguste Gautier, Joseph Dubuc, Marcelin Esnard, W. H. McLean, J. F. Bigot, J. B. Robertson, L. J. E. Mace,

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J. F. B. Courbet, wid. M. Gubarsche, Albin Soulié, Joseph Fuentes, Barthelemy Moreno, Jos. Hernandez, Pierre Lamabre, Nancy Villars, Alex. M. Agelasto, R. Devoe, Lilette Bonenquier, alias Bonseigneur, Augustus St. Amant, L. Attenent, F. M. Jacobs, Julian Dumant, J. Dupasse,
633 Marcelin Bethencourt, Wid. Pierre Cap, Adele Monqin, Wid. Raymond Loseul, John Pemberton, Theodore Guyol, Wm. Moran. Joe Sebatis, Jno. L. Gubernator, Michael Meilleur, jr., Louis Barnett, J. P. Siffrent, P. Avril, Dennis Cronan, Jean Allie, Owen Doherty, Francis Mouny, Wid. J. Juliet Keny, alias Reny, Wid. J. C. de St. Romes, Isidore Eugene Pinsard, Geo. Oscar Reinecke, Louis Avon, Josephine Hoa, Henry Parlange, Joseph Desplaux, Joseph Guilot, François Roumieu, Geo. Lohr, H. Larqui, John Johnson, Peter Mulier, alias Muller, Florville Foy, Louis E. Nie, François Lacroix, McDonough School-fund, Arthur B. Griswold, Joseph Diard Simon, E. Brunett, John and Jas. C. Davidson, Albin Rochereau, J. B. Muilhe, alias Mailhe, John Hoy, Jacob Newhouser, Victorine Demoruelle, B. Abadie, Raymond Rousselot, Felix A. Ducros, A. Boeto, Maria M. Doriocourt, tutrix of Maria Doriocourt, a minor, Joseph Doriocourt, Francis Doriocourt, André Doriocourt;
Aimée Rousseau, Alfred Rousseau, testamentary executor of the
634 will of Rodolphe Rousseau, V. Bouligny, Mary Bouligny, his wife, Antoine Fabre Nicolin, curator of the succession of Chas. Selinger; Bernard Avegno, testamentary executor of the estate of P. Avegno, Mrs. Pierre Oscar Peyroux, and her husband, whose name is to your oratrix unknown; Mrs. Franco Joseph Bauduc, & her husband, whose name is to your oratrix unknown; Mrs. Pauline Brietry, and her husband, whose name is to your oratrix unknown; Mr. J. P. Marmsout and her husband, whose name is to your oratrix unknown; Mrs. Ellen Phillips and her husband, whose name is to your oratrix unknown. Mrs. Celina Barant, alias Ravenal, and her husband, whose name is to your oratrix unknown; Mrs. Bazanac, & her husband, whoso
635 name is to your oratrix unknown; Mrs. Celina Magner, and her husband, whose name is to your oratrix unknown; The Southern Star Manufacturing Company, a corporation established by the laws of Louisiana, and doing business in New Orleans; Mrs. Charles Havenard, and her husband, whose name is to your oratrix unknown; Mrs. Jeremiah Scanlan, and her husband, whose name is to your oratrix unknown; Mrs. Henry St. Paul & her husband, whose name is to your oratrix unknown; Emma L. Walton and her husband, whose name is to your oratrix unknown; Mrs. Septima Morel and her husband, whose name is to your oratrix unknown; Mrs. Simeon Delord and her husband, whose name is to your oratrix unknown; Mrs. Jean Sauvage & her husband, whose name is to your oratrix unknown; the Canal Carondelet Navigation Company, a corporation established by the laws of Louisiana, & doing business in New Orleans; The Hope Insurance Company, a corporation established by the laws of Louisiana, and doing business in New Orleans;
636 Antoine Sarrat, Minor Kenner, Eliza Davis Kenner, administratrix of the estate of Minor Kenner, and tutrix of Daniel Kenner, Maria Kenner, Oxley Kenner, her minor children; Willis P. Coleman, E. Palmyre White, D. Prieur White, Geo. White, Athie White, Octavia White, N. P. Fisher and his wife, P. Augrain and his wife, S. Howell and his wife, H. D. Hopkins and his wife, John M. Brown, C. W. Hopkins, Mrs. Vance and her husband, J. G. Reiser, Jules Bermudez, Jules Lapière, Louis Benocke, Dennis Cronan, J. B. Patrick, Martin Soye, Mrs. Saliba, administratrix of the estate of Joseph Saliba, A. Miltenberger, J. A. Blanc, W. Hogan, Edward Barnett, George Griser, alias

Giseler, heirs of H. Lavergne, F. Hubert, John Sabie, alias Sable, Michael Lorentz, Jean Cazeneau, Alphonse Drez, Armand Banzane, Louis Mestier, Paugrere Wicker, John Miller, Henry Lorenz, Michael Dennis, Henry Grandmont, Charles Petrie, Miss M. A. Levassier, The Ponchartrain Railroad Company, a corporation established by the
637 laws of Louisiana, and doing business in the city of New Orleans, The City of New Orleans, a corporation established by the laws of Louisiana, the heirs of Paul Pesquier, who are aliens residing in the kingdom of France, and whose names are unknown to your oratrix, but who are represented by P. Cazanave, their agent and attorney, who resides in the eastern district of Louisiana aforesaid, and Teresa Pene Massana, an alien, who resides in the kingdom of Spain, who has an agent and attorney, to wit, Oscar Alex, who resides in Louisiana, in the city of New Orleans, and is a citizen of said State, in said eastern district, commanding them, by and under certain penalty, to be inserted, to be and appear before this honorable court, and then and there to answer the premises, and further to stand and abide such order
638 and decree therein, as shall be agreeable to equity and good conscience.

And oratrix will ever pray, &c.

(Signed) H. D. STONE,
Solicitor to Complainant.

NOTE.—Each defendant is required to answer each of the above interrogatories, numbered 1st, 2d, 3d, & 4th.

(Signed) H. D. STONE,
Complainant's Solicitor.

CLERK'S OFFICE.

A true copy of the original, filed Nov. 22d, 1865.
New Orleans, December 18th, 1871.

(Signed) F. B. VINOT,
Dy. Clk.

Copy of petition of appeal and order of appeal, and bond of appeal. Filed December 18th, 1871, nunc pro tunc, in accordance with agreement of Sept. 26th, 1871.

639 United States circuit court fifth circuit and district of Louisiana

MYRA CLARK GAINES
vs.
CITY OF NEW ORLEANS. } No. 2695.

Petition for appeal and order thereon.—Filed June 17th, 1871.

To the honorable the judges of the circuit court of the United States, fifth circuit and district of Louisiana.

The petition of the City of New Orleans, defendant in the above-entitled and numbered cause, respectfully shows:

That she is aggrieved by the final decree herein rendered on the 12th and signed on the 13th of June, 1871, against her, and in favor of complainant, Myra Clark Gaines; that this appearer is informed and believes that there is error to her prejudice therein; that the said judgment

640 is contrary to law and to the evidence adduced, and that the amount in controversy largely exceeds the sum of ten thousand dollars.

Wherefore petitioner, The City of New Orleans, prays for an order granting an appeal herein, which shall operate as a supersedeas upon petitioner giving bond in the sum of two hundred thousand dollars, as fixed by this honorable court, said bond to be filed within ten days from the signing of said decree, and that this appeal be made returnable to the Supreme Court of the United States on the first Monday of December, 1871; and petitioner prays that a copy of the appeal be lodged for the complainant in the clerk's office, where the record remains, and that said complainant be duly cited to appear and answer this appeal, and for all general and equitable relief.

(Signed) MILES TAYLOR,
641 (") J. McCONNELL,
Solicitors for City of New Orleans.

An appeal to operate as a supersedeas is allowed in this case as prayed for, and according to law, returnable to the Supreme Court of the United States the first Monday of December next, the appellants giving bond in the sum of two hundred thousand dollars, with sureties according to law.

June 17th, 1871.

(Signed) W. B. WOODS,
Judge U. S. Circuit Court for 5th Circuit & District of Louisiana.

Bond for appeal.—Filed June 17th, 1871.

Know all men by these presents that we, The City of New Orleans, herein represented by B. F. Flanders, mayor of said city of New Orleans, as principal, and Samuel Smith, James E. Zuntz, C. H. Slocomb,
642 J. L. Gubernator, C. Roselius, Hugh McCloskey, C. T. Howard, W. B. Schmidt, and M. Carvin, are held and firmly bound, jointly and severally, unto Myra Clark Gaines in the sum of two hundred thousand dollars, lawful money of the United States of America, to be paid to the said Myra Clark Gaines, her heirs, executors, administrators, & assigns, for which payment, well & truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated the seventeenth day of June, in the year of our Lord eighteen hundred and seventy-one.

Whereas the said City of New Orleans has this day presented a petition to the honorable the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louis-
643 iana, praying for an appeal from a final decree rendered on the 12th and signed on the 13th of June, 1871, in the suit entitled Myra Clark Gaines vs. The City of New Orleans & al., No. 2695, on the docket of the circuit court of the United States for the district of Louisiana:

Now, the condition of the above obligation is, that we, the above-bounden City of New Orleans, and Samuel Smith, James E. Zunts, C. H. Slocomb, J. L. Gubernator, C. Roselius, Hugh McCloskey, C. T. Howard, W. B. Schmidt, and M. Carvin, will well and truly pay to the said Myra Clark Gaines, the defendant in said appeal, all such dam-

ages as she may recover against us in case it should be decided that the said appeal was wrongfully obtained.

(Signed) BENJ. F. FLANDERS, [L. S.]
Mayor of City of New Orleans.

644 (") SAMUEL SMITH. [L. S.]
(") JAMES E. ZUNTS. [L. S.]
(") C. H. SLOCOMB. [L. S.]
(") J. L. GUBERNATOR. [L. S.]
(") C. ROSELIUS. [L. S.]
(") HUGH McCLOSKEY. [L. S.]
(") M. CARVIN. [L. S.]
(") W. B. SCHMIDT. [L. S.]
(") CHAS. T. HOWARD. [L. S.]

Signed, sealed, & delivered in the presence of—
(Signed) ALFRED SHAW.
(") JOHN S. WALTON.

Statement filed by plaintiffs.—Dec. 18th, 1871.

FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

Second district court for the parish of Orleans.

The bills and answers offered in plaintiff's note of evidence No. 50, in the suits of Mrs. Gaines vs. Lizardi & al., No. 2734; and same vs. City of New Orleans, No. 2695; & same vs. Chew, Relf & al., No.
645 122, in the U. S. circuit court, are contained & were filed in the printed bound volumes of the records of said suits 2734, 2695, & 122.

Reasons for judgment on rule for a new trial.—Filed December 23rd, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL. *vs.* MYRA C. GAINES. } No. 32979.

On the motion for a new trial, the attention of the court has been specially called to those grounds which relate to—

1°. The status claimed by Mrs. Gaines from judgments of the United States Supreme Court.

2°. The presumption in her favor of the existing probate of the alleged will of 1813.

3°. The weight which should be given to Mrs. Benguerelle's testimony.

4°. The presumption of legitimate paternity.

646 5° The fact that the copy of the bill in chancery of Mrs. Gaines against Fuentes & al. had not been filed; and—

6°. The plea of five years' prescription to this suit as being an action for the nullity of a will.

I. If it be conceded, as I think it must, that the reservations of the law and of the judgments of the Supreme Court in favor of parties against whom a will is set up as a muniment of title, to contest its

genuine'ss and validity, and also to contest the judgment of probate itself, continue indefinitely till the will is, in fact, set up against them, individually or against their title to property they have in possession, it follows, as a necessary consequence, that this right is independent of any status the party relying on the will may have previously enjoyed or acquired under the will.

647 If it were otherwise, the reservation in favor of a possessor, defending his title and possession, would be illusory, and the law would stultify itself. If Mrs. Gaines enjoys a status independen'ly of the will in question, she no doubt may urge it independently, and into such a status this court cannot inquire, nor does the issue in this case require any decision upon it, one way or the other. It may give Mrs. Gaines, if it exists, the right to recover property on the effect of it alone; but in so far as she alleges title under and by virtue of the will, she cannot preclude inquiry into the genuine'ss and validity of the will. The two counts are not necessarily connected; one may be true and the other not. My father may make a will in my favor, or he

648 may not. The question whether he has or has not made such a will, or whether (if he has) the will is valid or not, cannot and does not depend upon the fact of my status as a child of his. He may not have made the will, though I have been ever so well known as his child, or ever so many courts have decided that I was so in fact. He may have made a will, giving his disposable portion to another person, and my setting up a subsequent will may be of vital importance to persons deriving property under the first will. Hence the enquiry into the fact of the making of the will cannot be precluded or limited by the status. Hence, if the will contains a clause in which the testator acknowledges the legatee as his child, the fact of parentage may be disputed by a party attacked on that acknowledgment in the will,

649 in order to show that such an acknowledgment was not, or could not have been legally made. Of course, in a case where the status existed independently of the will, such a status would be conclusive in favor of the acknowledgement contained in the will, or, at least, a very strong case would have to be made out to overthrow the status, such as fraud, simulation, personating another, and the like; but where the status depends on the acknowledgment in the will, the status must necessarily stand or fall with the will. To reason otherwise would be to infer, from the will, that Daniel Clark was indeed married to Zulime Carrière, and then, from the marriage, so inferred, that the acknowledgment was really made. This would be arguing in a circle. Hence the status itself, even were there one proved, in a case like this, is necessarily in-

650 quired into, in order to ascertain whether, on the one hand it exists independently of the will, so as to have a strength of its own to sustain the alleged acknowledgment in the will, or, on the other, it merely rests on that acknowledgment and that will.

The probate of a will is an ex-parte proceeding, and from its being of that nature the law gives it a prima-faciæ effect where it is produced as evidence against third persons. It cannot acquire a greater force by lapse of time against third persons. They are entitled to regard it as a new thing, which they were not bound to know or notice before it is presented as a means of disturbing their possession of and title to property. Hence the heirship acquired under it cannot be properly

651 called a status, it being, in fact, only the prima faciæ position of legatee; for status is an undisputed condition growing of the fact itself, whether that fact be filiation, marriage, slavery, or other civil relationship, or out of such acknowledgment as the law allows as evidence

of the fact or of the status resulting from marriage, parentage, &c. If it grows out of an acknowledgment, it cannot have greater force in establishing a status than the law gives to the acknowledgment itself. Therefore, if the law permits the paper-writing containing the acknowledgment to be contested, it necessarily permits that the acknowledgment itself be disproved, for to refuse to hear a denial of the acknowledgment would be to refuse to permit the very contests the law allows.

These distinctions are forcibly illustrated by the decisions of
652 the Supreme Court of the United States in Mrs. Gaines' suits. She failed in her suits based upon a status as resulting from an alleged marriage, but when she came again, presenting herself as a legatee under a probated will, the court did not consider the previous decision against her status to be a bar to her claim as legatee. The controverse must be also true. Moreover, her present position as legatee is one which the law allows a possessor of property to dispute whenever she attempts to disturb him by virtue of the legacy, even though it may have been recognized by the courts in other suits, whereas, if she had succeeded once in a suit, based not on an allegation of heirship under a will, but on the naked allegation of a status, and seeking directly to prove and enforce it as such, the judgment in her favor would
653 have been binding on the world. But it must be noted that in this case status is opposed to status. First, by the contrary decisions of the Supreme Court, which, however, are reconcilable in the manner just stated; but, secondly, by the contrary status of Mrs. Gaines as set up on the one side by her and on the other by the petitioners. She alleges herself to be the child of a marriage between Daniel Clark and Zulime Carrière, and to hold that status under a decision of the Supreme Court of the United states; but the defendants offered to show, and did show, a previous marriage between the same Zulime and Jerome Desgrange, and that she necessarily held the status resulting from that marriage under the decision of the court which settled the fact that the previous marriage was undissolved at the date of her conception
654 and birth. (See judgment in suit for alimony, 1805.) Her status necessarily depends on that of her mother.

Her mother's status was fixed and settled by that judgment, which is just as binding on her and the rest of mankind as any other judgment. It is even conclusive as proof against the charge of bigamy made against Desgrange, for the suit was brought and judgment obtained several years after Zulime had become fully aware of that charge of bigamy. She could not, therefore, say she acted through ignorance, but the presumption is that she had ascertained the charge to be unfounded.

II. There was certainly a presumption in favor of the will of 1813, as probated; but that presumption was only prima facæ, and it yielded, as to the contents, to the counter-proof establishing the previous
655 marriage and status of Zulime, and disproving the alleged marriage with Clark, besides the weakness of the proof going to establish those contents as recited in the probate. I think it is easy to understand the difference pointed out in my reasons for judgment between the force of the evidence on the bare fact that Clark did make and have a will dated in 1813, and the force or weight of the evidence going to show what were the contents of that will. The bare fact is abundantly proved, not merely by Canon, Delacroix, and others, and by circumstances, such, for instance, as the action of Pitot, the probate judge, which action strongly corroborates the constant reference of the witnesses to him as one who had direct knowledge of the last and lost will. There is hardly anything in the record to contradict this naked

656 fact; but when we come to inquire what were the dispositions contained, the record abounds with evidence going to disprove the version of it set off in the testimony of Harper and Bellechasse.

III. As to Mrs. Benguerelle's testimony, its weakness and insufficiency are referable to its nature and to surrounding circumstances, and not to the mere reputation of the witness.

IV. Of course the presumption is in favor of legitimacy. When *a* Daniel and Zulime acknowledge a child as theirs, we should prima facæ infer that Daniel and Zulime were husband and wife, and the child their legitimate issue. The onus of disproving that prima-facæ legitimacy is on those who contest it; but as soon as the contestant shows by au-
657 thentic records of marriage, by notarial acts, judgments of courts, and by public notoriety, that Zulime was married to another man, the prima-facæ case disappears, and the legal and stronger presumption arises that the child is the legitimate issue of that well-authenticated marriage. The onus is shifted, and it must be shown as clearly, not merely her was a marriage between Daniel and Zulime, but also that her previous one with the other man was null or dissolved.

V. The fact that a copy of the bill in chancery, brought by Mrs. Gaines against the plaintiffs, had not yet been filed, and was not in the hands of the judge when the case was under advisement, nor at the time of the rendition of the judgment, is not material. There was a consent that it might be filed after the trial. In the mean time the parties plead
658 the case as if it was before the court. They assumed the facts it would show, and the other bills in chancery found in the record were, without objection, read to the court as being of the same purport and effect, on the points in question, as the one of which a copy was to be furnished. It has been since filed, and I find it substantially the same as that read in court from the printed record. There is, therefore, no reasonable ground on this point for granting a new trial, only for the sake of the ceremony of filing the copy at a date previous to the date of judgment. The court was put in possession of all the necessary data to decide the point which rested on the terms of that bill in chancery.

VI. As to the plea of five years, prescription against this suit
659 so far as it may be considered as a suit in nullity of a will, and as such distinguished from a suit to annul the ex-parte judgment of probate, I think the authorities cited by defendant's counsel, so far as they would bear upon a case like the present one, are overruled by subsequent decisions.

This suit goes beyond allegations of informality, encroachment on legitime, and the like, which presuppose a will only voidable, but it attacks a probate as being that of a pretended will that never existed in the terms set forth in the probate, and which, if it ever existed in those terms, would be void for reasons of public policy. In such a case the prescription of five years does not apply. So has our supreme court decided.

Moreover, this question brings back that of the effect of the
660 reservation made in favor of third parties by the law and jurisprudence of the State in regard to the force of a judgment probating a will.

Here is a party in possession of property. It is alleged that the title by which he claims & possesses this property from the legatees and executors of Daniel Clark, under a will made in 1811, is not valid, because Clark made a subsequent will, which was duly probated, and by which

he gave his property to Myra Gaines, who brings a suit against th possessor. The law allows the possessor to contest a will whenever it is set up against him as a muniment of title. Shall he be told that he should have done so ten or eleven years before the will was alleged as a ground for disturbing his title & possession? Non constat, but
661 that the legatee might never have brought such a suit. Hence, if the possessor had instituted this action previous to being sued by the legatee, would it not, perhaps, have been a sufficient answer to say to him, What right have you to complain? No one has yet attempted to disturb you by virtue of this probate. When they do so it will be time for you to defend yourself. The law reserves you that right.

It is vain to say that the possessors in this case appear in this court as plaintiffs. They could only be heard here on the ground that they are sued in the United States court; that the will is there set up against their title; and that there the court refuses to entertain the question of the validity of the will and of its probate; declines jurisdiction of that matter and refers them to the tribunals of the State. Evidently,
662 in coming here and bringing this suit, they are really defendants, though nominally plaintiffs. This suit is, in fact, only an incident of the petitory action brought by the bill in chancery. This is evident, also, from the argument made at the bar, to the effect that the plaintiffs shew no interest for contesting the will, unless they show they are attacked in the United States court, as deriving their title from the succession of Daniel Clark, or from the legatees under the will of 1811. Such an interest, it is conceded, they must have shown in order to maintain this suit. Therefore this suit would have lapsed, or could not be carried on, if the other had not been discontinued, or had never been interested.; therefore, also, this, a defensive and incidental proceeding, depending upon the existence of another action. It is not an
663 originally aggressive action. The plaintiffs occupy exactly the position they would stand in if they had been sued by Mrs. Gaines in a State court, and had set up the falsity and invalidity of the will and of its probate in their answer. Their right to contest the will on the ground that they now urge would in that case be undeniable. If, then, prescription would not exclude their defense in a direct suit brought against them in a State court, certainly it does not deprive them of that defense, when, though nominally plaintiffs, they are in reality defending themselves against the petitory action brought in the circuit court of the United States.

If the prescription of five years could run against one having and tracing undisturbed possession from 1815 down to the time his
664 right is first attacked, in 1855, say, fifty years, then success is assured by law to a fraud easily & safely practiced. It would suffice, in any old and almost forgotten succession, to probate, ex parte, a spurious & invalid will, wait in masterly inaction durin five years, and then sue the previously-recognized heirs, or their transferees, for the property derived from the estate. In vain would they appeal to the fact that the probate was ex parte; urge that the law did not give the probate the effect of a public judgment concluding them, claim the right reserved in their favor to contest it; in vain would they offer to prove forgery, bastardy, violation of public policy & morals, and infraction or prohibitory law. The plea of prescription, if operating thus silently and insiduously against their quiet possession and title, in favor of
665 one who makes no pretence of possession, would close the door to all investigation, and a demonstrable fraud against the real right and against the law itself would be infallibly triumphant.

The principle of the law of prescription would be reversed, and it would run in favor of the silent and inactive bearer of a paper title against an actual and overt possessor, who also has a title valid on its face.

If such were indeed the effect and interpretation of the article relied on, I would of course enforce it thus, though with regret; but I do not think it can be so understood. I am of the opinion that the right to contest a will and its probate on grounds of absolute nullity is reserved by law to a possessor whenever it is alleged against him, and
666 this right is not barred by the prescription of five years.

Indeed, I am satisfied that this prescription of five years, like every other when urged as perfecting title to property, must be accompanied by possession. A succession is an immovable; Mrs. Gaines' suit in the United States court is one claiming property, as having acquired it under the will alleged, and now by prescription, but she admits that the parties she sues have been in continuous possession, and that they claim that possession as owners, under adverse titles. True, she traverses the validity of the titles, but she admits that the possessors assert ownership; certainly they, and not she, are in condition to have the benefit of prescription. The principal authority relied on by her counsel confirms, instead of refuting, this view of the law.
667 The authority cited, Carroll vs. Carraby, 7 Martin, 376, et seq., shows expressly that Carraby had been and was in possession, as owner, under the will attacked, something more than five years, and the counsel and court refer almost on every page to that fact, as material to support the prescription pleaded.

New trial refused.

Judgment.

Second district court for the parish of Orleans.

JOS. FUENTES & AL. }
vs. } No. 32979.
MRS. MYRA C. GAINES. }

For the reasons assigned in the written opinion of the court this day delivered & on file, it is ordered, adjudged, & decreed, that the will purporting to be the will of Daniel Clark, and to be dated July 13th, 1813, as set forth in the petition and suit filed by Myra Clark Gaines on
668 (18th) eighteenth January, eighteen hundred & fifty-five, (1855,) in the record and matter of the succession of said Daniel Clark, No. 8646, of the docket of the second district court of New Orleans, be revoked and declared invalid, and that the probate thereof as obtained on said petition be annulled and recalled as absolutely null and of no effect.

It is further ordered that the defendant be condemned to pay the costs of this suit.

Judgment rendered December 4, 1871.

Judgment signed December 23d, 1871.

(Signed) T. WHARTON COLLENS, *Judge.*

Motion of appeal.—Filed Dec. 29th, 1871.

Second district court for the parish of Orleans.

JOSEPH FUENTES & AL.
vs.
MYRA C. GAINES. } No. 32979.

On motion of Fellows & Mills, and Race, Foster & E. T. Merrick, atty's of Myra Clark Gaines, defendant in the above-entitled
669 and numbered cause, and on suggesting & representing to the court that said defendant feels aggrieved and injured by the final judgment rendered against her in this cause, on the 4th December, 1871, and signed on the 23rd December, 1871, and considers the same erroneous, and desires to take a suspensive appeal therefrom to the supreme court of this State. And it further appearing to the court that there is not sufficient time between now and the next return day to complete the transcript and record of appeal.

It is hereby ordered & decreed that a suspensive appeal be, and the same is hereby, granted to said defendant, Myra C. Gaines, from said final judgment rendered in this cause, returnable to the supreme court on the third Monday of January, 1872, on said defendant furnish-
670 ing bond with good security, conditioned according to law, in the sum of one thousand dollars.

Bond of appeal.—Filed December 30th, 1871.

Second district court for the parish of Orleans, the State of Louisiana.

JOS. FUENTES & ALS.
vs.
MYRA C. GAINES. } No. 32979.

Know all men by these presents that we, Myra Clark Gaines, of the State of New York, as principal, and John W. Harmon & Edward Aleix of New Orleans, as securites are held and firmly bound unto M. O. Tracy, clerk of the second district court for the parish of Orleans, or his successors in office, in the sum of one thousand dollars, for the payment whereof we bind ourselves, our heirs, executors, & administrators firmly by these presents, sealed with our seals and dated in the city of
671 New Orleans, on this twenty-ninth day of December, in the year of our Lord one thousand eight hundred & seventy-one.

Whereas the above-bounden Mrs. Myra Clark Gaines has this day filed a motion of appeal from a final judgment rendered against her in the suit of Joseph Fuentes & als. vs. (No. 32979,) Myra C. Gaines, in the second district court for the parish of Orleans, on the 4th December, 1871, and signed on the 23rd of December, 1871:

Now the condition of the above obligation is such that the above-bound Myra C. Gaines shall prosecute her appeal, and shall satisfy whatever judgment may be rendered against her or that the same shall be satisfied by the proceeds of the sale of her estate, real or personal, if she be cast in the appeal, otherwise that the said Harmon &
672 Aleix shall be liable in her place.

(Signed) MYRA CLARK GAINES. [L. S.]
" JOHN W. HARMON. [L. S.]
" EDWD. ALEIX. [L. S.]

Clerk' certificate.

State of Louisiana, second district court for the parish of Orleans.

I, the undersigned, d'y clerk of the second district court for the parish of Orleans, do hereby certify that the foregoing five hundred and eighty-four pages (584) contain a true and correct copy of all the proceedings had, of all the evidence adduced, of all the testimony taken, and of all the documents filed in the case of Joseph Fuentes & als. vs. Myra Clark Gaines, No. 32979, of the docket of this court, with the exception only of such portions thereof which by agreement of counsel was not
673 to be copied in the record of appeal, the same being contained in the printed records filed in evidence, to be used before the supreme court, and hereby annexed to this transcript as part thereof, and identified by the filing in the 2d dist. court.

In testimony whereof I have hereunto set my hand & affixed the seal of this court this 2d day of February, 1872.

[SEAL.] (Signed) L. ARNAULD,
D'y Clerk.

674 Supreme court of Louisiana.

Assignment of errors.

Filed Febr'y 15th, 1872.
(Signed) M. P. JULIAN, *Depy. Clerk.*

JOSEPH FUENTES ET ALS.
vs.
MYRA CLARK GAINES. } No. 3700.

Myra Clark Gaines, defendant and appellant in the above-entitled cause, herewith pleads and files in assignment of errors—

1st. That the second district court for the parish of Orleans, by which court the judgment appealed from was rendered, had no jurisdiction of said cause at the time of rendering said judgment, for the reason that, previous to making any other appearance therein, this defendant, in all due legal form, petitioned for the removal of said cause to the United States circuit court for the district of Louisiana, under and agre'able to the provisions of the laws of the United States, and specially the act of Congress entitled "An act to establish the judicial courts of the United States," approved September 24th, 1789, and
675 the act entitled "An act to amend an act entitled 'An act for removal of causes in certain cases from State courts,' approved July 27th, 1844," which said amendatory act was approved March 2nd, 1847, and which petition for removal, with requisite affidavits and bonds, were duly filed in said second district court and contained in the transcript of appeal, and herewith made part of this assignment of errors, and whereby the jurisdiction of the said second district court ceased and was terminated.

2nd. That said second district court was without jurisdiction, on the ground of the cause of action as more fully set forth in defendant's several pleas and exceptions to the jurisdiction of said court on said ground, and contained in the transcript of appeal, and also herewith made part of this assignment of errors.

3rd. That the petitions of plaintiffs and intervenors allege no interest

in the estate of Daniel Clark which could authorize them to institute an action for the revocation of the probate of the last will of said Clark, as in said petitions prayed for.

676 4th. That said district court erred in denying the authority of the thing adjudged & the decrees of the Supreme and circuit courts of the United States, as set forth in defendant's several pleas of res adjudicata contained in said transcript of appeal and likewise made part of this assignment of errors.

5th. That said district court erred in receiving and rejecting testimony, as fully set forth in defendant's several bills of exception contained in the transcript of appeal, and which bills of exceptions are herewith made parts of this assignment of errors.

6th. That said district court erred in overruling defendant's pleas of prescription, also made part of this assignment of errors.

7th. That said district court erred in deciding said cause in favor of plaintiffs and intervenors when the judgment should have been in favor of said defendant.

RACE, FOSTER, & E. T. MERRICK,
FELLOWS & MILLS,
Attorneys of Dft. and Appellant.

677 Supreme court of La.

Motion to fix, filed April 8th, 1872.—Extract from the minutes.

MONDAY, *April 8th*, 1872.

The court was duly opened. Present, their honors John T. Ludeling, chief-justice, and James G. Taliaferro, Rufus K. Howell, W. G. Wyly, William W. Howe, associate justices.

JOSEPH FUENTES ET ALS.
vs.
MYRA CLARK GAINES. } No. 3700.

On motion of Geo. S. Lacey, city attorney, it is ordered by the court that this case be called and set for hearing by preference.

Supreme court of La.

Extract from the minutes.

TUESDAY, *April 23d*, 1872.

678 The court was duly opened. Present, their honors John T. Ludeling, chief-justice, James G. Taliaferro, Rufus K. Howell, W. G. Wyly, W. W. Howe, associate justices.

JOS. FUENTES ET ALS.
vs.
MYRA CLARK GAINES. } No. 3700.

This case was called for trial, and having listened to argument from J. McConnell, esq're, of counsel for plaintiffs and appellees herein, and the usual hour of adjournment of the court having arrived, ordered the said case to be continued for further argument to to-morrow, Wednesday, 24th instant.

Supreme court of La.

Extract from the minutes.

WEDNESDAY, *April 25th*, 1872.

The court was duly opened. Present, their honors John T. Ludeling, chief-justice, and James G. Taliaferro, Rufus K. Howell, W. G. Wyly, W. W. Howe, associate justices.

JOS. FUENTES ET ALS.
vs.
679 MYRA CLARK GAINES. } No. 3700.

This case was called for resumption of trial from yesterday, the 23d inst., and having listened to argument from W. R. Mills, esq're, of counsel for defendant, E. T. Merrick, esq're, of counsel for def't herein, and the usual hour for the adjournment of the court having arrived, ordered the said case to be continued for further argument to to-morrow, Thursday, 25th inst.

Supreme court of La.

Extract from the minutes.

THURSDAY, *April 25th*, 1872.

The court was duly opened. Present, their honors Jno. T. Ludeling, chief-justice, and James G. Taliaferro, Rufus K. Howell, W. G. Wyly, W. W. Howe, associate justices.

JOSEPH FUENTES ET ALS.
vs.
MYRA CLARK GAINES. } No. 3700.

This case was called for resumption of trial from yesterday, the 24th inst., and having listened to argument from E. T. Merrick
680 esq're, of counsel for defendant herein, and Miles Taylor, esq're, of counsel for plffs. and appellees herein, the court took the same under advisement upon the brief filed by plaintiffs and appellees herein, and the papers now on file and the briefs to be filed on behalf of parties by counsel within thirty-five days from this date.

Supreme court of La.

Extract from the minutes—Decree.

MONDAY, *February 24th*, 1873.

The court was duly opened pursuant to adjournment. Present, their honors John T. Ludeling, chief justice, and James G. Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices.

JOSEPH FUENTES ET ALII
vs.
MYRA C. GAINES. } No. 3700.

On appeal from the 2nd district court for the parish of Or-
681 leans, it is ordered, adjudged, and decreed that the judgment of the court, a *qua* be affirmed with costs of appeal.
(Mr. Justice Howell, dissenting, read a separate opinion in this case.)

Opinion of the court.—Filed February 24th, 1873.

(Signed) M. P. JULIAN,
Dep'y Clerk.

Mr. Chief Justice Ludeling delivered the opinion of the court in the words and figures following, to wit:

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682 JOSEPH FUENTES ET ALS. *vs.* MYRA CLARK GAINES. } No. 3700.

Appeal from the second district court for the parish of Orleans.

This is an appeal from a judgment of the second district court of the parish of Orleans, which revoked, and declared invalid, the will probated in 1856 as the will of Daniel Clark of 1813.

Joseph Fuentes and seventy-five other persons, named in the petition, allege that Myra Clark Gaines made application to the said 2nd district court, on the 18th day of January, 1855, for the probate of an alleged lost will of Daniel Clark dated July 13th, 1813, and that upon hearing she obtained from this court an order, by which said pretended lost will was recognized as the last will and testament of Daniel Clark, and it was ordered to be recorded and executed as such. The petitioners
683 aver that the said order or decree was obtained ex parte; and that, by its terms, it authorized any person, who might, at any time, become interested to do so, to contest the said will and the probate thereof, and to show that no such will was executed, either in a direct action or as means of defence, by way of an answer or exception, whenever the said will should be set up as a muniment of title. They aver that the said Myra Clark Gaines has, since she obtained the probate of said will, instituted suits against them, in the circuit court of the United States, in the State of Louisiana, in which suits she sets up said will as a muniment of title, as the instituted heir of Daniel Clark, and she claims and demands from them sundry tracts of land and properties of large value.

They allege that they cannot contest the validity of said pretended will of 1813 in the circuit court of the United States, on account
684 of the peculiar jurisdiction of said court, so long as the order of probate remains unrecalled by the 2d district court.

They allege that the probate of the pretended will of 1813 was a gross fraud upon the rights of petitioners—that the will never existed—that the evidence and testimony of the witnesses, upon which the will was probated was false or erroneous, illegal and insufficient. That if any will was made by the said Daniel Clark at any time other than the one admitted to probate and ordered to be executed by a decree of the pro-

bate court, dated on the 17th day of August, 1813, which is expressly denied, it was destroyed or suppressed by Daniel Clark himself. They allege that Clark left no will whatever posterior to that dated May 20th, 1811, which was probated in the probate court of the parish of Orleans,
on the 17th of August, 1813, by which Mary Clark, the mother of
685 Daniel Clark, was instituted his universal legatee, and which probate and will remained in force for nearly half a century, as the basis of title to the property of the succession of Daniel Clark.

The petition then represents that Daniel Clark was never married; that he had no ligitimate child; that he never recognized Myra as his ligitimate child; that he made ample provisions for her as his illigitimate child by secret trusts, which trusts were duly executed by those confided with the property intended for her; and that Clark did not make and could not have made a will in favor of Myra on account of her status, as the law of Louisiana forbade it.

They pray that the will of 1813 may be revoked and that the probate thereof may be recalled and annulled.

Mrs. Myra Clark Gaines in limine litis prayed for the transfer
686 of this cause to the circuit court of the United States, alleging that she is a citizen of the State of New York and that the matter in controversy exceeds five hundred dollars. She made the affidavit and gave the bond required by law. Her application having been refused, she again applied to have the cause transferred to the circuit court of the United States under the act of Congress, dated 2 March, 1867, and her application was a second time denied.

On the 10th of January, 1870, Mrs. Gaines filed the plea of res judicata against the City of New Orleans.

On the 18th of January, she filed an application for the recusation of the judge of the 2d district court, and he recused himself.

On the 26th of March, 1870, she filed the following exceptions: That the 2d dist. court had no jurisdiction or right to proceed further with
this cause, after her said applications to have the cause trans-
687 ferred to the circuit court of the United States; "that this court is not vested with jurisdiction of this suit, in this, that this defendant is the heir at law and universal legatee of Daniel Clark and in possession, and that the constitutional and legal jurisdiction of this court is confined exclusively to probate jurisdiction, and does not extend to a jurisdiction of this cause, either as regards the parties thereto or the subject matter of said suit."

She further excepts that the plaintiffs have been improperly joined, in instituting this suit; that they have not shown in themselves any authority or legal interest in and to the succession of Daniel Clark, either as heirs, legatees, or otherwise, and they are thus without right to contest the ligitimacy of the defendant as heir of Daniel Clark, and
thus without right to contest the validity of said will of Clark, and
688 the defendant's rights under the same. She excepted that the allegations charging fraud, error, illegality, and insufficiency in the evidence upon which the will of 1813 was admitted to probate are vague and indefinite and not sufficiently clear to enable defendant to know as against what evidence or what particular testimony of any of said witnesses she is required to defend her rights against said alleged fraud, error, illegality, or insufficiency.

She further excepts that the court has not jurisdiction to try the question of her status, inasmuch as that question was decided by the Supreme Court of the United States in the suit of Myra Clark Gaines vs. City of New Orleans and others, instituted in the circuit court of the

United States for the fifth circuit and the then eastern district of Louisiana, No. 2695, which decision she alleges is res judicata.

The judge a quo maintained the exception, so far as to require
689 the plaintiffs to amend their petition in that part charging "fraud, error, illegality, and insufficiency in the evidence," &c., and he overruled the other exceptions.

On the 28th of April, 1870, the petition of intervention of Rudolph Huberwold and others was filed.

On the 7th of May, 1870, the intervention of John and James C. Davidson was filed.

On the 11th of February, 1871, in obedience to the order of the court, the petitioners filed their supplemental petition, setting forth specifically the grounds for their allegations of fraud and error, and designating particularly the alleged illegality and insufficiency of the evidence on which the will was probated, etc.

On the 29th of April, 1871, she filed her answer. It admits the probate of the will of 1813, but denies that the evidence and testimony
690 upon which the will was admitted to probate was false, erroneous, illegal, or insufficient. She denies that the plaintiffs or intervenors, or any of them, allege any right of action to contest the validity of the order of probate, or to seek the revocation of the will of Clark of the 13 July, 1813; and she avers that that decree has acquired the force of res judicata. She further pleads the prescription of one, three, five, and ten years.

On the 3d of June following, she filed the plea of res judicata, as to all the parties, on the question of her status.

This record, consisting of 575 pages, in manuscript, and portions of six printed volumes, furnishes proof of the patience and care with which this case has been tried. During the course of the trial upwards of thirty bills of exceptions were signed. The elaborate arguments, oral and by briefs, of counsel exhibit great labor, research, and ability; and they have greatly lessened the labors of this court.

691 In this court the counsel for the defendant have filed an assignment of errors, which groups together the questions which they deem important in this case. They are substantially as follows:

I. That the 2d district court was without jurisdiction to try this cause, after the defendant had made her application to have the cause transferred to the circuit court of the United States.

II. That said court was without jurisdiction on account of the subject-matter of the suit.

III. That the plaintiffs and intervenors allege no interest in the estate of Daniel Clark, which could authorize them to institute a suit to revoke the last will of Daniel Clark.

IV. That said court erred in denying the authority of the thing adjudged to the decrees of the Supreme Court and circuit court of the United States, as set forth in defendant's several pleas of res judicata.

692 V. That said court erred in receiving and rejecting evidence, as shown by the several bills of exceptions.

VI. That said court erred in overruling defendant's pleas of prescription.

VII. That the court erred in deciding said cause in favor of the plaintiffs and intervenors.

We will take up these questions in their order:

I. We are of opinion the judge a quo properly refused to transfer the cause to the circuit court of the United States, because that court has

not jurisdiction to try the principal if not the only objects of this suit, the legality and sufficiency of the evidence upon which the lost will was admitted to probate, and the revocation of the will.

That the United States courts are without jurisdiction in probate matters is too well settled to be now questioned. 9 Peters, 174; Tarver vs. Tarver, 2 How., 619; Gaines vs. Relf and Chew; and 6 Wal., 693 p. 642, Gaines vs. New Orleans

And it seems equally well settled that "it was not intended to extend the jurisdiction of the United States courts over causes brought before them on removal beyond the limits prescribed by their original jurisdiction." (Conklin, 155; 2 Summers, 338.)

II. The subject-matter of this suit is purely probate in its character, to wit, the revocation of the probate of a will, and the suit was properly brought under the circumstances of this case in the probate court which had made the order to record and execute the will. (13 An., 138, 177; 1 La., 19; McCombs vs. Dunbar et al., 8 N. S., 520; Harty vs. Harty, 5 La., 394; 5 Rob., 286; 1 An., 171; 17 La., 4.)

III. The plaintiffs and intervenors substantially allege that they have been sued by Mrs. Gaines for property which she alleges belonged to the succession of D. Clark, and of which they are in possession; 694 that she claims the same under the will of Clark, dated 13 July, 1813; that Clark left no other testament than that dated 20 May, 1811, by which Mary Clark, his mother, was instituted heir, and that that will has been the basis of title to the property of his succession for nearly half a century.

And the bill in equity of the said Myra C. Gaines against these parties alleges that they (the plaintiffs in this suit) sometimes "pretend that one Richard Relf and one Beverly Chew sold said property to the defendants as testamentory executors of a will of said Daniel Clark, made in the year 1811, which had been admitted to probate in the probate court for the parish and city of New Orleans, and as attorneys-in-fact for one Mary Clark, the devisee in said will of 1811, named," &c. And in the letter of Mrs. Gaines to the mayor of New Orleans, dated 6 September, 1870, claiming from the city $4,996,039.32, and pro- 695 posing to compromise for $4,000,000, she gives a history or the chain of title back to the estate of Clark. These admissions show that they are in possession under titles derived from Relf and Chew, either as executors of the will of Clark or as the attorneys-in-fact of Mary Clark, the forced heir and universal legatee under the will of 1811 of Daniel Clark. They are interested, therefore, to show that the will of 1813 is not valid, when it is opposed to them as a muniment of an adverse and better title to property in their possession.

And as they cannot attack the probate of the will in the circuit court of the United States, where the petitory action against them has been brought, they should be permitted, ex necessitate rei, to bring this suit in the probate court in which the order for probate was granted, 696 otherwise it would be possible for a will to be fraudulently probated, and then to sue persons in possession under titles from the heirs in the circuit courts of the United States, without the possibility on the part of the possessors to expose the fraud. (See 13 An., 138, 177; 5 La., 394; Lewis Heirs vs. His Executors, 17 La., 4; Roberts vs. Allier's Agent.)

IV. It is urged that the court a quo erred in not holding that the order probating the will of 13 July, 1813, is res judicata.

It would seem from the decisions of this court, reported in the thirteenth volume of the Annuals, pages 139 and 178, that this question was definitely settled.

In the case of the heirs of Mary Clark vs. Myra C. Gaines the court said, "The decree of the supreme court, which it is the object of this suit to annul, is one which, upon its face, invited contestation, for it reserves, by its terms, the right to attack the will probated, not
697 only to all persons who were not parties to the proceedings for the probate of the will, but even to one who was a party to those proceedings" * * * "To refuse, therefore, to the plaintiffs the right of action to set aside the probate of this will would be, in fact, to deny them the remedy which the very decree of probate purported to secure to them. It is not in this court such an argument should meet with favor. Our decree in the case of the succession of Clark (11 An.) meant what it expressed. Our reservation of the rights of all parties in interest was substantial, not illusory."

And in the case of Delacroix vs. Gaines, the court said: "By referring to the case of Clark's succession, in 11 Ann., it will be seen that we carefully guarded against any inference being drawn that the decree should not be open to attack. We even asserted that it would
698 be open to attack by a direct action in the name of a party interested. And if, as alleged, (and we must at this stage of the case take the allegation for the truth,) the defendant is seeking to avail herself in the courts of the United States of a rule there recognized, that an ex-parte decree probating a will, although open to question collaterally in all the courts of the State where it was rendered, is not to be so questioned in a United States court, but it is to be conclusive upon all the world, there is a manifest propriety in giving the relief, which was reserved by the very terms of our former opinion and decree to third persons, whose interest might be sought to be affected by it."

But if we leave out of view what has been expressly decided in regard to the effect of the probate of the will in question as to third
699 persons, and test the question by the jurisprudence of this State and of other countries on the subject, we will arrive at the same conclusion, to wit, that an ex-parte order admitting a will to probate is not a judgment binding upon those who are not parties to the proceedings; that the ex-parte order for the recording and execution of the will is a preliminary proceeding for the administration of an estate, and not a final judgment which concludes any one. It is a mere license to authorize the executor or heir to carry out the provisions of the testament; and the verity and validity of the will must be established whenever questioned by third persons from whom property is judicially demanded under the will. (10 Mart., 1; 7 N. S., 470; 2 La., 26; 11 La., 388, 395; 12 La., 214; 17 La., 4; Roberts vs. Alliers, Agent; 2 An., 724; 4 An., 570, Succession of Dupuy; 1 Rob., 115, Rachal et als. vs. Rachal et al.; Marcadé, vol. 4, Tit. 11, Donations et Testaments, art. 970, No.
700 18, p. 12; Code of Practice, art. 943.)

"A will," says Jarman, "is proved in common form when the executor presents it before the judge; and, in the absence of, and without citing the parties interested, produces witnesses to prove the same. Upon the testimony of these witnesses that the will exhibited is the true, whole, and last will and testament of the deceased, and sometimes upon less proof, and even upon the oath of the executor alone, the judge grants probate thereof. This mode of proof, though not in very common use, is still adopted and practised upon in some of the United States. * * * But it is not conclusive upon heirs or distributees, and may be opened and set aside, if necessary, and applied for in time. At common law, when a will had been proved only in common form, with-

out notice to those interested, the probate might be re-examined within thirty years after probate."

701 We have seen that the judges who rendered the decision probating the will of 1813 did not themselves consider it binding on any one; that it was a mere license to Myra Clark Gaines to sue. Without a probate of the will, she could not have gone into any other court to sue for property as the instituted heir of Clark. With the probate, she could sue and claim property under the will, but those to whom she opposed this will could deny that such a will existed when Clark died; that the probate was made on legal or sufficient evidence, and that the will was valid under the laws of Louisiana; and the onus of proving these facts would devolve upon the party who asserted the validity of the will. (Marcadé. vol. 4, p. 12; 13 An., 86.) It appears from the opinion in the case of Delacroix vs. Gaines, (13 Ann.,) as well as from the probate record in evidence in this suit, that there were parties

702 who came forward to contest the existence and the validity of the will of 1813, when Myra C. Gaines had it probated, but they were refused the right to contest its validity or existence on the grounds, substantially, that their interest was not affected by the probate; that when they were disturbed in their possessions, it would be time enough for them to oppose the probate or the will.

If this ruling was correct, then how can it be pretended that the probate proceedings are binding on them now? Is it possible that a system of jurisprudence exists anywheres which would allow a claimant to obtain an ex-parte judgment, which would have the effect of destroying the titles of persons who never had notice of the claim—nay, of persons who were refused the right to contest the claim in the very proceedings wherein the ex-parte order was made?

703 We think not. Certainly it does not exist in Louisiana; and the judge a quo correctly overruled the first plea of res judicata.

It is next contended that the plea of res judicata against the city of New Orleans should have been maintained. The thing demanded in the former suit is not the same as that claimed in this action. "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality." (C. C., art. 2286.) We deem it as unnecessary to pass upon the other plea of res judicata, based upon the supposition that the Supreme Court of the United States has decided and fixed the status of Myra C. Gaines, in Gaines vs. Hennen, &c. If it

704 be true that the Supreme Court of the United States have decided the question relative to her status, independently of the will of 1813, that august tribunal will no doubt adhere to that opinion. But we do not consider that question properly involved in this suit.

V. It is not necessary to pass upon most of the bills of exceptions taken in this case, as they relate to evidence affecting the status of the defendant, which we do not consider necessary to decide in consequence of the conclusion arrived at on other questions involved in this controversy.

We will remark, in the next place, that the objection of irrelevancy, urged to so much of the evidence offered, is a very weak objection when the case is tried without the intervention of a jury. In such a case the only question in effect is upon the sufficiency or weight of the evi-

705 dence. If any evidence be found in the record which we consider not relevant we will ignore it. (1 Greenl., p. 58.)

There was no error in ruling the defendant to go to trial without waiting for the intervenor, Elmore. The intervenor seems to have consented to let the trial proceed without him; at any rate, he had not objected.

The defendant excepted to the reception of a translation of a letter from J. D. D. Bellechasse to D. W. Coxe, dated December 10th, 1819, found in the record of the suit of Myra Clark Gaines vs. City of New Orleans, and in connection therewith and to prove the loss of the original, its genuineness as a true copy or translation of the original, the deposition of W. Cope and G. B. Duncan, and the endorsement thereon made by F. Perrin, solicitor for Mrs. Gaines. It is shown that said translation was admitted in evidence in the above-named suit as
706 a correct translation of the original letter, which was admitted by Mrs. Gaines' solicitor to be genuine; and Cope, who made the translation, swears it was correctly translated. It is alleged that the original letter is lost, it is not proved to be in existence, and it is quite certain it never was in the possession of the plaintiffs. Bellechasse was interrogated in regard to this letter, and he challenged its production.

We think it was properly received in evidence in this case, as it was the best evidence which the nature of the case would admit of.

In regard to the bills of exception taken by the defendant to the rulings of the court striking out portions of the testimony of Boisfontaine and others, on the ground that the testimony was hearsay, we concur with the judge a quo.

707 A bill of exceptions was taken to the ruling of the judge admitting a letter written by Mazureaux to Coxe, in May, 1842. The grounds stated in the bill of exceptions are that Mazureau was alive during the pendency "of the litigation in the United States court, and after issue joined in that suit, so that his direct testimony could have been taken." "He was counsel of record opposed to Myra Clark Gaines in the United States court." The status of Mrs. Gaines cannot be enquired into in this cause." "The letter contains (besides the facts stated) expressions of opinions which are not evidence."

We have already said we will not pass upon the question relating to the status of the defendant further than it may be affected by our judgment in regard to the will of 1813.

In so far as that letter contains opinions of the witness, it is
708 not competent evidence. But we agree with the district judge that the other objections are not reasons for rejecting the evidence, even if we overlook the vagueness of the objections. But the counsel for the defendant have urged in their briefs and oral arguments other objections to the evidence. It is well settled that objections not stated in a bill of exceptions will not be considered by this court. We could as well be required to reject evidence which had been received without objection in the court of the first instance.

A bill of exceptions was taken to the reception in evidence of the answers of Richard Relf to the bill in chancery in the case of Gaines and Husband vs. Relf, Chew et als., filed in January, 1845, on the grounds following:

That judgment of the supreme court probating the will could not be attacked "after the lapse of time;" that the status of
709 Mrs. Gaines had been decided by the Federal courts, and the plaintiffs have no right or authority to question her status; that the said Relf and Chew "were not interrogated under oath," and their answers were put at issue by a replication; that the answers "were post litem motam;" that it is contrary to law and evidence that

the allegations of a party in his own favor should be read in evidence by other persons not parties to such controversy, and because answers in chancery are not admissable in evidence; because the defendant was and is deprived of the benefit of cross-examining said Relf, and because there is no obligation on a suitor to offer testimony, which she believes to be false, erroneous, and untrue; that the testimony is "res inter alios acta" and irrelevant.

710 In order to act intelligently in receiving or rejecting this evidence, it will be necessary to bear in mind some of the facts disclosed by the voluminous records, containing the history of the remarkable litigation relative to the will, which forms the subject of this suit. In June, 1834, Myra Clark Whitney (now Gaines) instituted proceedings to revoke the testament of Daniel Clark, dated 20th May, 1811, and to probate his alleged lost will of 13 July, 1813. The plaintiff in that proceeding took the testimony of Mr. and Mrs. Harper, S. B. Davis, Bellechasse, Delacroix, Boisfontaine, and others by commission; and in 1836, when the heirs of Mary Clark, the universal legatee under the will of 1811, and the mother of Daniel Clark, and Relf and Chew, the executors of that will, insisted upon proceeding with the trial, Mrs Gaines submitted to a non-suit rather than try the case.

711 In 1845 Mrs. Gaines instituted a suit against Relf and Chew and others, for the property of the succession of Clark, claiming as the legitimate heir and as the instituted heir under the lost will of Daniel Clark. A demurrer was filed to the bill in equity, and subsequently an answer was filed by the said Relf and Chew. The case was brought before the Supreme Court of the United States on the demurrer by a division of the judges on certain points, which were certified under the act of Congress. The opinions of the judges were opposed on the following points:

1. Is the bill multifarious, and have the complainants a right to sue defendants jointly in this case?

2. Can the court entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed?

712 3. Has the court jurisdiction of this case, or does it belong exclusively to a court of law?

The court said "the demurrer is not before the court, but the points certified. In considering these points, all the facts stated in the bill are admitted."

The court having held that the circuit could not establish the lost will, said, "A deliberate consideration of the question leads us to say, that both the general and local law require the will of 1813 to be proved, before any title can be set up under it. But this result does not authorize a negative answer to the second point. We think, under the circumstances, that the complainants are entitled to full and explicit answers from the defendants, in regard to the above will. These answers, being obtained, may be used as evidence before the court

713 of probate to establish the will of 1813, and revoke that of 1811. In order that the complainants may have the means of making, if they shall see fit, a formal application to the probate court, for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained." (2 How., 646.) In 1848, about three years after the decision on the demurrer, Mrs. Gaines filed an amended bill, in which, among other things, she said, "And your orator and oratrix further show unto your honors, by way of amendment to said bill, that they will renounce for all the pur-

poses of this suit against the defendants herein named, all claims which your oratrix has heretofore made to the estate of said Daniel Clark as his universal heir and devisee by the said will of 1813, and that she will,
as against the defendants herein named, assert and maintain her
714 right, title, and equity to the four-fifth parts of the property and rights embraced in this amended bill and supplement, as the forced heir of the said Daniel Clark, deceased," &c. (Vol. 2, N. O. record, p. 78.) And availing herself of the right given to her by the court, she propounded divers questions to the defendants. This suit was finally decided againt Myra Clark Gaines in 1852. (12 How. 539.) On the 18 of *of* January, 1855, Mrs. Gaines filed in the second district court, of the parish of Orleans, her petition praying for the probate and execution of the will of 1813. The city of New Orleans, F. D. Delacroix, and Richard Relf filed interventions, and prayed to be allowed to contest the probate of the will. Mrs. Gaines excepted to their intervention, on the ground "that a probate of a will is a proceeding to be had ex parte—a
mere preliminary step in the administration of an estate, not bind-
715 ing on third parties, and open to contestation in any proceeding based upon its validity, in which it is relied upon as the basis of title or of any right asserted as against third parties; and on the further ground that the intervening parties are without interest in the subject-matter before the court, and therefore cannot be permitted to embarrass the proceedings." And the interventions were dismissed. Now the evidence objected to is the answers of Richard Relf to the bill in equity filed by Myra Clark Gaines, to obtain which the Supreme Court of the United States said it would maintain the jurisdiction of the circuit court, notwithstanding the demurrer was technically correct, in order that said answers might be used in evidence on the probate of the will of 1813.

The answers were sworn to. The complainant had full op-
716 portunity to question Relf upon the subject-matter of the lost will, and the present suit is between the ayant-cause of the defendants in the suit in which said answers were made. But complete mutuality or identity of parties is not necessary. "It is generally deemed sufficient," says Greenleaf, "if the matters in issue were the same in both cases, and the party, against whom the deposition is offered, had full power to cross-examine the witness. Thus, when a bill was pending in chancery, in favor of one plaintiff against several defendants, upon which the court ordered an issue of devisavit vel non, in which the defendants in chancery should be plaintiffs, and the plaintiffs in chancery defendant; and the issue was found for the plaintiffs, after which the plaintiff in
chancery brought an ejectment on his own demise, claiming as
717 heir at law of the same testator, against one of those defendants alone, who claimed as devisee under the will formerly in controversy; it was held that the testimony of one of the subscribing witnesses to the will who was examined at the former trial, but had since died, might be proved by the defendant in the second action, notwithstanding the parties were not all the same; for the same matter was in controversy in both cases, and the lessor of the plaintiff had precisely the same power of objecting to the competency of the witness, the same right of calling witnesses to discredit or contradict his testimony, and the same right of cross-examination in the one as in the other. * * * The same rule applies to privies, as well as to parties." (1 Greenl., § 553,
554.) The same author says, "And though the two trials were not
718 between the same parties, yet, if the second trial is between those who represent the parties to the first, by privity in blood, in law, or in estate, the evidence is admissible. And if, in a dispute respecting

lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point or fact in another action between the same parties or their privies, though the last suit be for other lands." (1 Greenl., § 164; 7 Rob., 440.)

Relf had died before the institution of this suit. If he had been living he would have been a competent witness in the case. But his sworn declarations, in answer to charges propounded against him by the said Myra C. Gaines, are in existence in that suit. The Supreme Court said his answers might be used as evidence to probate the will of 1813; and the said Gaines has had full power and opportunity to question and cross-question him. It is difficult, therefore, to see any sub-
719 stantial reason why the evidence cannot be used by those who have an interest to prove no such will existed at the death of Clark. The great length of time that intervened between the death of Clark—nay, between the period when the defendant reached her majority and the institution of the proceedings to probate the will of 1813, in 1834 and 1855—the fact that on those occasions she declined to contest the validity of the will with those who held property under the will of 1811, who were ready to try the issue with her, and the further fact that the plaintiffs did not have an opportunity to show that the will was invalid or not legally probated until after their possessions were disturbed by the suits in the United States circuit court, instituted since the death of Relf, are circumstances which incline us to receive
720 the evidence. The general rule, that the best evidence the nature of the case will admit of must be produced, would seem to decide this question. "It is only another form of expression of the idea that if one loses the higher proof, he may use the next best in his power. The case admits of no better evidence than that which you possess, if the superior proof has been lost without your fault." (2 La., 168.)

Over forty years after the death of Clark, long after his contemporaries had passed off the stage of life, the plaintiffs are obliged to attack the will set up by the defendant as the muniment of her title to lands in their possession under titles derived from his succession. We are of opinion that the answers should have been received.

V. The plea of prescription was properly overruled.

The prescription, upon which counsel in their briefs appear to
721 rely, is that of one and five years, and they cite articles 1994 and 3542 Ray's C. C., and art. 613 Code of Practice. This article of the Code of Practice clearly refers to a judgment in a contested suit, but which has been obtained through fraud, or because the defendant had lost the receipt given him by the plaintiff. Article 1994 of the Civil Code applies to acts made in fraud of creditors. Article 3542 refers to actions for the nullity of testaments when the instituted heir is in possession of property under the will, and is sued by the heirs at law to annul the will and take from the instituted heir the property. It does not apply to a case of this kind, in which a defendant in a suit in chancery is obliged to come to the probate court to establish a part of his defence, in consequence of the limited jurisdiction of the circuit court of the United States.

722 The maxim "Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum" is applicable to this case. If the petitory action instituted in the circuit court had been filed in one of the district courts of this State, no one would pretend that the defendants could not attack the will and ask for judgment annulling it. She cannot deprive them of that right by suing in the circuit court. Their rights can be barred only by the laws of Louisiana, where they reside, and where the prop-

erty in controversy is situated, which are obligatory on the Federal as well as State courts, and the Federal courts do not claim the right to bring foreign laws into this State. The only right which the plaintiffs in this suit have to attack this will is because they are disturbed in the possession of their property by the suits in chancery aforesaid.
723 Until they were sued in the Federal court, they had no cause of action. It was immaterial to them how many wills were probated, unless they were disturbed in the possession of their property; and prescription against them could not have run until their cause of action had arisen, nor can prescription run against one in possession.

There is no foundation for the plea of prescription; and we concur in the views of the judge a quo, when he says: "If the prescription of five years could run against one having and tracing undisturbed possession from 1815 down to the time his right is first attacked, in 1865, say fifty years, then success is assured by law to a fraud easily and safely practiced. It would suffice, in any old and almost forgotten succession, to probate, ex parte, a spurious and invalid will; wait in masterly inaction during five years, and then sue the previously
724 recognized heirs, or their transferrees, for the property derived from the estate. In vain would they appeal to the fact that the probate was ex parte, urge that the law did not give the probate the effect of a public judgment concluding them, claim the right reserved in their favor to contest it; in vain would they offer to prove forgery, basterdy, violation of public policy and morals, and infraction of prohibitory law. The plea of prescription, if operating thus silently and insidiously against their quiet possession and title in favor of one who makes no pretense of possession, would close the door to all investigation, and a demonstrable fraud against the real right, and against the law itself, would be infallibly triumphant." We do not recognize such to be the law or jurisprudence of Louisiana.

VII. The last assignment of errors presents the questions
725 involved on the merits of this cause—those we deem important are the following: Did Daniel Clark leave a testament dated on 13th July, 1813? Are the contents of that will proved by two credible witnesses, who read, or had read to them, the will?

In proving a lost olographic will, with a view to its probate and execution, is it necessary to prove all the essentials of an olographic will? Or, is a paper, containing testamentary dispositions, wholly written and signed by the testator, but dated in July, 1813, without specifying any day, an olographic will? Is it dated?

Can an olographic will be proved, except by those who have a knowledge of the handwriting of the testator from having often seen him write and sign his name? And must that knowledge, and the source of that knowledge, be stated by the witnesses?

In deciding these questions, we would have less difficulty if
726 this court had not, in an ex-parte proceeding, passed upon several of them. But, inasmuch as the decision in that case is not binding on the plaintiffs in this suit, it is our duty to examine the questions and to decide them without being influenced, if possible, by what was decided in the 11 of annuals.

Daniel Clark died in the city of New Orleans, on the 16th day of August, 1813. The procès verbal of the magistrate who affixed the seals upon the effects declares—

"This day, the sixteenth of the month of August, 1813, and the thirty-eighth of American Independence, we Gallien Préval, one of the jus

tices of the peace for the city and parish of Orleans, were present at the decease of Daniel Clark, this day, at six o'clock in the afternoon, and we were requested by Richard Relf to affix the seals on all the papers belonging to the estate of the said Daniel Clark, for the accom-
727 plishment of which we, in the presence of James Pitot and Dussuan Delacroix, the said Richard Relf having been requested by us to show us the papers of said estate and having conducted us to the room of said deceased, proceeded, in the presence of witnesses above named, to remove all the said papers and to place them in a desk and armoire which we found in the room of deceased, after which we affixed the seals on the doors of the room, and placed Mr. Francisco Morales as guardian of the said room, who promised, under oath, to fulfil well and faithfully the duties of his charge, and has, together with us and the witnesses named, signed the same, on the day, month, and year above mentioned.

"FRANCISCO his + mark. MORALES.

"At the moment of the closing the procès-verbal, the said Richard Relf having found, in a trunk of the deceased, the olographic
728 will, we removed it, in presence of the witnesses above named, for the purpose of delivering it to the honorable judge of the court of probates."

(Signed)—

"JAMES PITOT.

"DUSSUAN DE LA CROIX.

"RICHARD RELF.

"GALLIEN PRÉVAL,
"*Justice of the Peace.*"

Thus, it appears that James Pitot, the parish judge, Delacroix, Relf, and Francisco Morales, and the justice of the peace, Gallien Prèval, were present, immediately after the death of Clark—nay, at his death—and that the justice of the peace affixed the seals on the effects of the succession according to law.

On the 17th day of August, 1813, the olographic will of Clark, dated 20th of May, 1813, was probated by James Pitot, the parish judge.

On the 18th of August, 1813, Francis Dusuau Delacroix filed a petition in the probate court of the parish of Orleans, in which he represented that he had strong reasons to believe that Daniel Clark had made a testament or codicil posterior to that which had been opened
729 and probated. "And whereas it is to be presumed that the double of the last will, whose existence was known by several persons, might have been deposited with any notary public of the city, he prayed to have the notaries summoned within twenty-four hours, to certify under oath if there existed or not in their offices any testament, codicil, or sealed packet deposited by the said Clark."

The notaries were summoned, and they certified that they had no will or codicil of the said Clark. It is not pretended that anybody ever saw the alleged lost will after the death of Clark, and Boisfontaine alone testifies that Clark spoke of the will in his last illness. Boisfontaine states that Clark spoke to him of his last will repeatedly during his last illness, and he said "his will must be taken care of on her (Myra's) account." Again, "He told Lubin, his confidential servant, to be sure as soon as he died, to carry his little black case to Chevalier Delacroix."

730 Is it probable that Clark ever made such statements to this witness? If he felt any uneasiness or doubt about the safety of his will, would he not have had it deposited where it could not have been tampered with. It is proved that the parish judge, Pitot, was named as one of the executors of this will, and that he lived near by Clark. How easily he might have relieved his mind of anxiety about the safety of the will! Is it probable that he could have directed his slave to take his black case and carry it to Delacroix after his death? He knew that the slave would not have been permitted to take away anything of value from the house after his death. And if he had desired Delacroix to have the will, he would have sent it by his slave during his life.

Again, he says, "When, after the death of Clark, the disappearance of his last testament was the subject of conversation, I related what Clark had told me about his will in his last illness. Judge Pitot
731 and John Lynd told me that they read it not many days before Mr. Clark's last sickness; that its contents corresponded with what Clark had told me about it," etc. It appears from his testimony, and that of Harriet Harper and Bellechasse, that Pitot was one of the executors named in the will, and that in the will was a legacy of five thousand dollars in favor of Judge Pitot's son.

Is it not most wonderful that Judge Pitot, who was thus interested, and who believed, according to this witness, that a will had been left by Clark other than the one dated 20th May, 1811, should have probated the said will of 1811 immediately after Clark's death, and that no effort was made to establish the lost testament during the lives of Judge Pitot or of John Lynd? According to Boisfontaine, there were four witnesses alive who had read the will only a short time before Clark's death, and several others who had been told its contents.
732 Judge Pitot was himself one of the witnesses, and John Lynd, one of the notaries summoned to certify if they had such a will, was another, who, it is said, had read the will. Is it probable that Pitot and the other executors of Clark, all personal friends of the deceased, would have failed to make an effort to establish the lost will, if the narrative of Boisfontaine had been true?

What amount of reliance is to be placed in the testimony of a witness who is uncontradicted, who undertakes to give the details of conversations, in themselves not probable, which occurred over twenty years before, it is very difficult to determine. This witness, however, speaks of the conversations which occurred during the last sickness of Clark and after his death with a positiveness and certainty that few persons would in regard to conversations after the lapse of only a few months, and to him alone did Clark speak of his will during his sickness.

The improbability of the facts detailed by him, and the great
733 length of time which intervened between the period when he testified and the conversations which he details, incline us to attach but little credit to his testimony.

Another remarkable fact is, that although Bellechasse and Delacroix (who were named as executors in the last will) were with Clark during his last illness, one of them on the day before his death, yet he never mentioned the subject to either of them. They were his cherished personal friends; Boisfontaine was his employé or overseer. Delacroix testified "that, after the death of Clark, witness was not much surprised that the last will of Clark was not produced or found, for it is to his knowledge that Clark had requested several other persons, as he had deponent, to become his executors," etc. We may fairly infer from this testimony that after Delacroix had had the notaries cited to produce

any will or codicil of Clark, deposited with them, and the said notaries had declared under oath that they had no will or codicil of Clark,
734 he and the other friends of Clark adopted the legal presumption that he had destroyed it himself.

That other witnesses had seen a will posterior in date to that of 1811, and that Clark spoke to others about such a will is proved; but it was before his sickness that these witnesses saw the will or that Clark told them of it.

It is not proved, nor has any attempt been made to prove, that Clark could not have destroyed the will, even after the conversations with Boisfontaine—if they occurred—in which he spoke to Boisfontaine about the will.

When last seen, the will was in the possession of Clark, and it could not be found at his death.

The presumption of the law in such a case is, that the testator destroyed it animo cancellandi, and the onus of rebutting this presumption is cast upon those seeking to establish the will. (1 Redfield on the Law of Wills, p. 350; 10 Yerger, 84; 11 Ala., 596; 6 Wend., 174; 11 Wend., 227; 3 Pick., 67.)

There is not a particle of proof in the record to rebut this pre-
735 sumption. The theory of the witness Bellechasse that Relf destroyed the will is not supported by any evidence. That Bellechasse himself could not have believed the story at the time of the death of Clark, and for several years after, is abundantly shown, we think, from the confidence he himself reposed in Relf, and from the friendly and confidential manner in which he corresponded with him during the year, and later, after the death of Clark. Either Bellechasse was himself a villain and hypocrite, or he did not believe that Relf was the spoliator he represents him to have been in his testimony, given upwards of twenty years after the occurrences concerning which he testified.

On the 9th of October, 1814, he wrote a letter to Relf, which commenced thus:

"MY FRIEND: I have never forgotten you, and your last mark of
736 friendship shows me that the constancy of the misfortune that attaches to everything that relates to you does not equal your own constancy." * * He concludes the letter thus: "Should you be persuaded that what I have written or said will compromit me, seek an interview with L. and together engage my family to await me at Pensacola. Neither you, my friend, nor L. shall suffer from advances made for this purpose, as I am in a position to be infinitely useful to you. * * * In the mean time, receive my thanks, and believe in the gratitude of your sincere and devoted friend."

In a letter of a subsequent date, he says: "You have yourself to blame, my dear friend, if I have not made a reconveyance of the property that our friend Clark sold to me. I have offered to do so on many occasions, and under some pretext you have always put it off and permitted me to go without speaking about it." This was in relation
737 to the property placed in Bellechasse's name for the benefit of Myra.

Continuing the letter, he says: "I have, therefore, considered it my duty to write to you, which I now do, and send you the accompanying document, in order to prove that my declaratory act was made before I left Louisiana, and placed in the hands of Pedesclaux. I have preferred this, persuaded that you can do, at little expense, all that can be done; and in order that he cannot, in case of a requisition, do any evil, obtain

an interview with him, recover from him the documents, for which you will give him your receipt, and all will be finished," etc.

Is it possible that Bellechasse could have thus confided to one whom he knew or believed to be a villain?

But be that as it may, there is no evidence whatever to establish the truth of the hypothesis that Relf destroyed the testament, but a letter written by Bellechasse to Relf in 1822 would seem to indicate more than a doubt as to whether even he believed that the will had
738 been destroyed by Relf, for he says: "Je ne doute pas que si le testament de Clark ne s'était perdu, que l'on aurait vu que la partie de ces viens confiés au chevalier De la Croix, était designée à M'elle Caroline, comme peut l'affirmer Mr. & M'de Harper qui assurent que Clark leur en avait fait l'aveu." But if it be conceded that Bellechasse believed or suspected that Relf destroyed the will, surely the opinions or suspicions of a witness cannot overcome the presumption raised that the testator himself destroyed the will. (3 Phillimon, 128.)

There are other facts in this case which corroborate this presumption. One fact is that Clark left the will of 1811, which was found in his trunk, as stated in the procès-verbal before mentioned. Another is that he left in force the secret trusts in favor of Myra. If she was his legitimate child, and he had made a will wherein he had acknowledged her to be such, and constituted her his universal legatee, why did he leave
739 those trusts in her favor unrevoked, and why did he not destroy the former will? The record shows that Clark was an intelligent gentleman. He must have known that the property left for Myra, in the name of Bellechasse and Delacroix, would be subject to judicial mortgages and legal mortgages against those gentlemen, in spite of themselves. Why, then, would he have unnecessarily subjected that property to such risks?

The probability is that he would have destroyed the will of 1811 and the secret trusts aforesaid, if he had intended to leave the alleged lost testament. Another fact, which corroborates the presumption of the law, is the absence of any motive on the part of Relf to destroy the will of 1813. The will of 1811 was a sealed will, and until it was opened for the purpose of its probate, Relf could not know what its provisions were; on the whole, we are of the opinion that the presumption that Clark himself
740 destroyed the will has not been rebutted by the evidence offered to establish the will; and we have arrived at this conclusion without giving effect to the answers of Richard Relf, or to the letter of Mazureau. In the answers of Relf, however, it is emphatically denied that he ever destroyed, or that he ever saw, the will; and his answers repel the idea of the existence of such a will, while the letter of Mazureau shows the motive or reason which may have influenced him in destroying the will.

Are the contents of the lost testament of Clark proved by two credible witnesses, who had read, or had had read to them, the lost will?

Bellechasse, Mrs. Harriet Harper, Boisfontaine, and Delacroix are the only witnesses who testify to the existence or contents of the will.

The Chevalier Delacroix said:

"Deponent called to see Clark at his house on Bayou road. He
741 there found him in his cabinet, and he had just sealed up a packet, the superscription on which was as follows: 'Pour être ouvert en cas de mort.' Clark threw it down in the presence of deponent, and told him that it contained his last will, and some other papers, which

would be of service; deponent did not see the will; does not know anything about its contents. He only saw the packet with the superscription, as before related."

Boisfontaine says: "Deponent never saw the last will of Clark; he only saw the package when Clark showed it to Mr. Delacroix."

Bellechasse saw the will, but he never read it. We infer this from his own testimony. He says, in his testimony given in Dec., 1834: "He (Clark) told the deponent that he had completed or finished his last will; that the deponent, Judge Pitot, then present, and the Chevalier Delacroix, were his executors named in it, (the deponent having
742 given his consent before,) and that apart from some legacies for his friends, and a due pension for his mother, his said daughter Myra was the heiress of his fortune, duly habilitated for that purpose, and gave the said will open to us to look at and examine. The deponent saw that it was all in his own handwriting and signed by him, the said Daniel Clark." To cross-questions, he answered, "That the aforesaid last will of 1813 of said Daniel Clark was shown by him of his own accord to deponent, and also Judge Pitot, at the time mentioned in his answer in chief," etc. And again, he answered, "That although he took neither note nor copy of said will of 1813, yet from the interesting nature of those details that he, (Clark) had given of it, he had those details strongly impressed on his memory."

In answer to another set of interrogatories filed in 1837, Bellechasse says, "A very short time before the sickness that ended in his
743 death, he (Clark) conversed with us about his said daughter Myra in the paternal and affectionate terms as theretofore. He told us he had completed and finished his last will. He, Clark, therefore took from a small black case his said last will, and gave it open to me and Judge Pitot to look at and examine. It was wholly written in the handwriting of said Daniel Clark, and was dated and signed by the said Clark in his own handwriting. Pitot, Delacroix, and myself were the executors named in it, and in it the said Myra was declared to be his legitimate daughter and the heiress of all his estate." In answer to a cross-interrogatory, he answers, "My knowledge of English is limited; but as I have three daughters, one son, and two sons-in-law, who understand it, and some of them perfectly well, when I require an English translation, I avail myself of the services of some or more of my family." It is not probable from his testimony that he understood the English language sufficiently well to have read Clark's will; and
744 it appears pretty clearly from his testimony that what he knew of the contents or details of the will, he learned from Daniel Clark. This appears also from the following translation from his letter to Coxe, dated in 1819: "Unhappily, he (Clark) died, and without their having been able to find the will, which he had very certainly made before his departure for Natchez, some time before his death, telling me that I was one of his executors, as well as Messrs. Relf, Delacroix, and Pitot;" and again, in the same letter, he says, "She (Caroline) may have been mentioned in the will of which he spoke to me, and which disappeared, God knows how."

This visit to Natchez must have occurred upwards of a year before Clark's death, as will appear from his letter to Coke, in which he speaks of challenging one Minor to fight a duel, and would correspond with the date at which Mazureau says Clark talked with him about his will.
745 It seems sufficiently proved that Bellechasse did not read the will, and this fact appears to be admitted by Mrs. Gaines in her bill in equity, filed in 1836:

"Your orator and oratrix further show unto this honorable court, and expressly charge, that the said will was wholly written and signed with the proper hand of the said Daniel Clark, and that the said will was shown by the said Clark to, and its contents read by, the said Judge James Pitot, the late John Lynd, notary public, in and for the parish and city of New Orleans, Mrs. Harriet Smith, and others; and that the said will was shown also, and its contents communicated by the said Daniel Clark, to the said Colonel Bellechasse, Chevalier Delacroix, Mr. Pierre Baron Boisfontaine, and others."

Mrs. Harriet Harper (or Smythe) swears she read the will. It is urged, however, that a woman cannot be a witness to establish a lost will,
746 and article 1584 of the civil code, which declares that "woman are absolutely incapable of being witnesses to testaments," is relied upon. That prohibition is to women attesting wills, as clearly appears from the French text of the article, "sont absolument incapables d'être temoins dans les testaments."

Mrs. Harriet Harper (or Smythe) is the only witness who read the will. Boisfontaine and Bellechasse, the other witnesses who speak of the contents of the will, derived their knowlege from the testator. We do not think this competent evidence to establish the contents of a lost will. It would practically authorize the making of verbal testaments, which is not recognized by our laws. Besides, if the declarations of the testator could be received to prove the contents and the verity of a lost olographic will, a lost testament could be proved by evidence which would be incompetent to prove the will if produced in court.

In the succession of Eubanks this court said, "The appellee
747 contends that the testimony of witnesses that Mrs. Eubanks (the testator) had told them said will was entirely written by her, satisfies the law. We think otherwise. Article 1648 of the code is express that the only proof admissible of olographic testaments is the testimony of two witnesses, that they recognize the handwriting as having often seen the testator write or sign during his life-time.

We are of opinion that it is necessary to prove that the lost will contained all the essentials of an olographic will, before it can be admitted to probate, to wit, that it was wholly written, dated, and signed by the testator, and the witnesses must state the facts which are necessary to enable the court to determine whether or not the will is valid. Marcadé, vol. 4, p. 11.

In this case two witnesses, Harper and Bellechasse, state that the will was wholly written, dated, and signed by Clark. Bellechasse states
748 it was dated in 1813; Harper says it was dated in July, 1813. Is this sufficient? Is a testament which is dated A. D. 1813, or July, A. D. 1813, to be deemed dated in the sense of the law? Certainly not, if the term dated is to be understood in its "common and usual signification." C. C., art. 13, 1946.

Webster defines the word dated thus: "That addition to a writing which specifies the year, month, and day when it was given or exercised." Bouvier, verbo date. Marcadé says:

"Dans l'usage la date complète se constitue de l'indication du lieu, de l'année, du mois et du jour, où l'acte s'est fait; mais l'indication du lieu ne saurait être exigée. En effet, les dates, dans le sens propre de ce mot, ne sont que les indications des temps, non celles des lieux. Les mots date, dater, dans la loi comme partout ailleurs, n'expriment que l'idée de temps, d'époque. L'ordonance de 1735, en exigeant pour les testaments olographes l'indications des jours mois et an, ne demandait nullement l'indication du lieu, et il parait évident que le code a

749 entendu la date comme l'entendait cette ordonance. Tout le monde est d'accord sur ce point." (Vol. 4, p. 7.) Le principe nous parait être que la date, qui est exigée par l'article 970, est celle du jour, du mois, et de l'année. (Demolombe, vol. 21, p. 77; Merlin, verbo testaments, vol. 13, p. 595; Sirey code civil, art. 970, p. 427.)

It is essential, therefore, to specify the day, month, and year to give a date to a testament, in the sense of article 1588 of the civil code.

It is insisted, however, that the said witnesses state "that the will was dated." That is true; but to hold that such a declaration in regard to a lost testament is sufficient would be to substitute the opinions or judgments of the witnesses for that of the court. If the will was dated, what was the date? The witnesses fail to inform us, except as above stated. There is not a jot or tit'le of evidence to prove the will was dated 13th July, and we are at a loss to imagine how that date happened to be given to the will when it was probated in 1856.

750 Again, these witnesses did not see the lost will at the same time, but out of the presence of each other. It cannot be certain, therefore, that they testify in regard to the same will, as they have not stated the date of the will.

The witnesses do not state that they ever saw Clark write or sign his name; they do not even say that they were acquainted with his handwriting. From the intimacy between Clark and Bellechasse it is probable that he was familiar with his handwriting. But it is not probable that Mrs. Harper was so. There is nothing in the record to suggest that she ever saw any of his writing except the will which he gave her to read, and which she saw but once. But we are not permitted to imagine what their knowledge was, when the law requires proof to be made of the fact. Article 1655 of the civil code provides that "the olographic testament shall be opened, if it sealed, and it must be acknowledged and proved by the declaration of two credible persons,

751 who must attest that they recognize the testament as being entirely written, dated, and signed in the testator's handwriting; as having often seen him write and sign during his life-time."

The right to make a testament at all is derived from the law. The legislature which conferred the right could undoubtedly impose such rules for the probate of wills as it deemed proper, and those rules or restrictions are obligatory upon courts. If we were at liberty to disregard one part of the article of the code, we can disregard it entirely; and instead of two witnesses the court might be satisfied with one, or with no witness at all, substituting in lieu of witnesses letters of the testator to enable the court to decide from a comparison of handwriting; or, in case of the loss of the will, receiving the proved declarations of the deceased. That would be setting aside the provisions of article 1655 of the code, and would certainly be legislation on the part of the court; and it is as certainly unauthorized, when there exists positive legislation on the subject, upon which the court is required to act.

752 That the provisions of article 1655 are obligatory upon the court was held in the following cases: 9 An. 149, Succession of Eubanks; 18 An. 444, Fox vs. McDonough's Suc.; 23 An. 117, Shepherd Will Case.

But if the court were permitted to infer that Harper and Bellechasse had seen Clark often write and sign, still the evidence would fail to satisfy us that reliance could be placed in the testimony of Bellechasse. His letters written in 1814 and within a few years thereafter cannot be reconciled with his testimony given in 1834 and 1837. In his letter to Relf, dated 23rd October, 1822, he writes:

"Je ne puis donc rien changer à ma déclaration, sans me parjurer et ouvrir la porte à un procès que M'elle Myra aurait droit de me faire; de plus, que puis je vous dire dans un nouveau pouvoir? surtout ne m'ayant pas renvoyé le premier. Je ne puis avoir exactement présentés les expressions de Clark; je pourrais m'en écarter involontairement, ce que je n'ai pu faire à l'époque de mon acte déclaratoire,
753 où elles se trouvaient encore gravées dans ma mémoire. Néanmoins, et relativement à M'elle Caroline, je puis dire, et même jurer, que Clark avait une trop belle âme et le cœur trop bien placé pour avoir été capable, ayant deux enfans qu'il adorait, d'en avoir voulu favoriser une, en laisant l'autre exposée à mendier son pain et livére aux vicissitudes qu'entraîne la misère. Je ne doute pas que si le testament de Clark ne s'était perdu, que l'on aurait vu que la partie de ces biens confiés au Chevalier de la Croix était désignée à M'elle Caroline, comme peut l'affirmer Mr. & Mde. Harper, qui assurent que Clark leur en avait fait l'aveu," etc.

From this letter it is apparent that he did not know the contents of the will, for he expresses the belief that the lost will contained provisions which would have shown that the property confided to Delacroix by Clark was intended for Caroline. It shows also that Mrs. Harper had assured him that Clark had told her the same fact. If she had
754 read the will, why did she have to state what Clark had told her about it? The letter shows that, even at that date, he himself could not trust to his memory in regard to the details of a trust confided to him; yet, (12) twelve years later, he undertook to tell the details of the will of Clark. In this letter he says Clark had two children, whom he adored; while in his testimony he swears that he "never heard said Daniel Clark speak of having any other child besides the said Myra." Again, in his letter to Daniel W. Coxe he writes that Relf was one of the executors named in the will of 1813, and in his testimony he says he was not. He swears that Clark had lost confidence in Relf; while Boisfontaine, Cannon, and others swear he had not; and all the written evidence in the record bearing on the subject goes to contradict him.

But it is not necessary to expose further the unreliability of his testimony, nor to comment upon the testimony of Mrs. Harper in regard to the will, given nearly a quarter of a century after she had read
755 the will. The law of Louisiana does not allow a lost will to be established by the "dim recollections, imaginations, or inventions of anile gossips," as, we trust, we have shown already. Here, as elsewheres, those propounding a lost testament must prove by competent evidence that the will was duly executed by the testator, and that it was in existence at the time of his death.

We have arrived at the following conclusions: That the evidence does not rebut the presumption of law that the will was destroyed by Clark himself, the will having been last seen in his possession; that in establishing a lost will all the essentials of a will must be proved, and in this case one of the essentials, to wit, a date, has not been proved; that two credible persons, who have often seen the testator write and sign, are necessary to prove an olographic will, and the witnesses in this case are not shown to have had any knowledge of the handwriting of the testator.

756 It is, therefore, ordered, adjudged, and decreed that the judgment of the court a quo be affirmed, with costs of appeal.

Dissenting opinion.

FUENTES ET ALS.
vs.
MYRA CLARK GAINES. } 3700.

Mr. Justice Howell dissenting:

I am unable to concur in the opinion of the majority of the court on several important points in this case, two of which, I think, are fatal to plaintiffs' demand.

The action is one to revoke a will and recall the probate thereof as null, and I can find no interest in the plaintiffs sufficient to authorize them to bring suit in the probate court. They do not allege themselves to be heirs of the testator, or (in direct terms) to have derived title to property from his estate through a forced heir or other person, and, therefore, they have no right of action.

But if they have such interest as will maintain the action of nullity of a testament, they must be held liable to the law of Louisiana fixing the prescription of such actions.

757 Their allegation that they cannot contest the validity of the will in the circuit court of the United States, where they say they are sued by the defendant for certain lands, on account of the peculiar jurisdiction thereof, cannot, in my opinion, change the rules of pleading, the relations of parties, and the laws relating thereto and governing the rights of litigants so as to maintain them in the attitude of defendants, using as a shield what, in their suit, they wield as a weapon of attack. If the defendant had a right to sue them in the United States circuit court, common justice would accord to them there all the defences to which they are justly and legally entitled. But if it be true that they cannot show in that court, as they allege, that the will or its probate is not valid as to them, it is their misfortune, for which the laws and the courts of Louisiana are not responsible, and we are not authorized, in my opinion, to bend the law to meet their case.

758 I think the action, if properly brought, is prescribed by five years under article 3542 (3507) of the civil code, and that the judgment of the lower court should be reversed and plaintiffs' suit be dismissed.

759 Supreme court of La.

Petition for rehearing.—Filed March 15th, 1873.

NOTA BENE.—The above document could not be found in the office.

760 Supreme court of La.

Extract from the minutes.

SATURDAY, *March 29th*, 1873.

The court was duly opened; present, their honors Jno. T. Ludeling, chief-justice, James G. Taliaferro, Rufus K. Howell, Wm. G. Wyly, Philip H. Morgan, associate justices.

His honor, the chief-justice, pronounced the judgment and decree of the court in the following cases:

JOS. FUENTES & ALII
vs.
MYRA CLARK GAINES. } No. 3700.

It is ordered that the rehearing applied for in this case be refused.

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761 *Certificate.*

UNITED STATES OF AMERICA.

Supreme court of the State of Louisiana.

I, John Miller Howell, clerk of the supreme court of the State of Louisian, holding sessions at the city of New Orleans, do hereby certify that the foregoing seven hundred and sixty (760) pages contain a full, true, and complete copy ot the transcript of the proceedings had in the second district court for the parish of Orleans, in a certain suit wherein Joseph Fuentes et als. were plaintiffs and Myra Clark Gaines was defendant, and also (with the exception of the petition for rehearing filed in this court, which document after due and diligent search in my
762 office could not be found) of all the proceedings had in this supreme court on the appeal taken by said defendant, which appeal is now on the files thereof, under No. 3700.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court at the city of New Orleans, this tenth day of October, anno Domini one thousand eight hundred and seventy-three, and in the ninety-eighth year of the Independence of the United States of America.

[SEAL.] JNO. M. HOWELL, *Clerk.*

763 To the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States:

The petition of Myra Clark Gaines, a citizen of the State of New York, & defendant in a certain cause wherein Joseph Fuentes, Theodore Guyol, Jules Lepene, Marcelin Esnard, D. B. Macarty, P. O. Peyroux, Owen Doherty, Albin Soulie, Florville Foy, G. Levasseur, M. A. Levasseur, M. Meilleur, F. M. Jacobs, P. Avril, Francis Mourey, N. Reilleux, Mrs. E. Vance, Alfred Rosseaux, testamentary executor of the estate of Rodolph Rosseaux, Mrs. S. Morel, and her husband O. Morel, herein acting & assisting, Geo. Bischoff, Albin Rochereau, S. E. Brunett, J. A. Blanc, J. L. Gubernator, Francois Lacroix, V. Demourelle, W. F. Vredenberg, The City of New Orleans, David Stickney, Ferdinand Thompson, Alphonse Drez, Mrs. Simond Delord, therein assisted & authorized by her husband, Joseph Guillotte, John Despaux, J. Hoa, J. Herdandez, Jules Lavergne, Louis Mertier, J. Bavard, R. Rousselot, A. B. Gris-

wold, R. J. Ker, J. B. Slawson, J. C. de St. Romes, P. H. Mousseaux, C. Morel, M. Largue, B. Abadie, Pierre Minneville, J. T. D. Lefebre, M. J. Lidardi, Raymond Carite, Casimir Carite, James L. Swan, J.
764 Dauphin, H. Dauphine, M. de Liano, Thos. Robertson, V. Baccus, P. Brunett, J. M. Brunett, William Crippell, P. Pasquier, R. Massena, N. Dabon, J. J. Lamoine, B. Abadie, M. Gueno, A. Boumgartner, Pierre Sherry, N. Lougue, J. Francois, wid. Geo. Perilleoux, Melina Ross, all of them citizens of Louisiana, are plaintiffs, respectfully represents that she is aggrieved by a final judgment in the supreme court of the State of Louisiana, bearing date the day of March, 1873, instant, and that she exhibits to your honor a copy of all such portions of the record as are necessary to a full understanding of the nature of the points upon which she specially feels aggrieved, and an affidavit showing the impossibility for want of time to furnish the entire record in the case.

That it appears on the face of the portion of the record furnished herewith, that your petitioner claimed the right & privilege under the Constitution and laws of the United States to have said cause removed from the 2nd district court of New Orleans, wherein the said cause originated, to the circuit court of the United States for the district of
765 Lousiana; that she did this repeatedly, and for the reasons therein set forth and as appears in the transcript of record herewith presented, and requested said removal, which request and her right & privilege in the premises were as repeatedly denied her; that failing in her said application & request for removal as aforesaid, she was compelled to go to trial on the merits of the controversy in said second district court; that judgment was entered against her, from which judgment she appealed to the supreme court of the State of Lousiana, the court of last resort in said State, wherein she presented the same questions, made the same demand, & was again refused her said rightful request & prayer for removal, & final judgment was rendered against her upon said & other points, appearing in the judgment of said court herewith presented, contrary to her legal & constitutional rights in the premises.

That said parties, plaintiff' in said suit in said 2nd district court, applied for the revoking of a will of Daniel Clark, of the date of July 13th, 1813, and for recalling said will & declaring the same absolutely null & void, as will appear by the copy of said will in the transcript
766 herewith; that your petitioner, defendant in said suit, applied to said court for the removal of said cause to the circuit court of the United States for the district of Louisiana, on the grounds of her rights as a citizen of the State of New York, and on the ground that she had reason to, and did, believe that from prejudice and local influence she would not be able to obtain justice in said court; that the matter in dispute exceeded the sum of two thousand dollars, exclusive of costs; & for other grounds, as appears set forth in petitions for removal and applications for new trial in the transcript filed herewith; that the right to a removal was denied her, & jurisdiction claimed & held, notwithstanding said claim & demand made with all due formalities of law.

That in said suit was also drawn in question the authority of the decree of the Supreme Court of the United States in the cases of petitioner vs. The City of New Orleans and others, they being of the plaintiffs in said suit, and between petitioner and F. D. Delacroix, the ancestor of another of said plaintiffs, which decrees were pleaded as the thing adjudged between them and petitioner, and the force and authority of the said decrees were denied her by the rulings of said 2nd district court of New Orleans.

767 That certain answers of said Delacroix & of Chew & Relf, in certain bills of discovery allowed by order of the Supreme Court, were allowed as testimony against petitioner to the denial of the force & authority & intention of said decrees of the Supreme Court of the United States in that behalf, and especially of that decree which had found the contrary of said answers to be true.

That, subsequent to said petitions for removal & the refusal of the same, certain persons, citizens of Louisiana, intervened in said suit, joining the plaintiffs in their demand for the annulling of said will, and that afterwards judgment was entered in said court, annulling said will & its probate, whereupon petitioner, as hereinbefore set forth, prosecuted her appeal therefrom to the supreme court of the State of Louisiana, & presented to it all the questions presented in the court of the first instance, including her demands for removal of said cause as aforesaid, and demanded the reversal of the decree & orders of said district court, & especially the orders refusing the removal of said cause to the circuit court of the United States; but that said supreme court affirmed the decree & orders of said 2nd district court, and especially the order for the removal of said cause as aforesaid; which decree of

768 said supreme court is now final, and as to which she complains: that the said decree of the supreme court & its rulings were erroneous, and against the Constitution & laws of the United States & of the rights of petitioner thereunder, and which rulings, as appears in the transcript herewith, increases petitioner's belief that, from prejudice & local influence, she cannot obtain justice in the State courts of Louisiana.

That the following are the intervenors in said suit: Randolph Huberwald, Bernard Soloy, Mrs. Matthews, in her own right & as tutrix of her minor children; John Henry Smith, Palmyra Gravier, L. D. Kernion, John McGinnis, Theodore Morard; William H. Johnson, Mrs. Mary Martin, administratrix of the estate of Joseph Trader; Mr. & Mrs. J. Remele, John & James C. Davidson, William A. Elmore, in his own right & as tutor of his minor children, Florence, Franklin, Henry & Minor M. Elmore; Fanny Montgomery, aided by her husband Edward Montgomery; Wm. M. Minor & Mrs. Myra T. Minor, all residing in New Orleans; & Adolph Sigur, tutor, to Achille Sigur, in the parish of Iberville; Henry D. Minor, for himself & as tutor of the minor children of John L. Minor & Mrs. L. D. Minor, both deceased, to wit, George, John, & Sidney Minor; all said intervenors, residents of Louisiana.

769 Wherefore petitioner prays your honor to allow a writ of error to the supreme court of the State of Louisiana, with supersedeas in said case, & sign citations to said plaintiffs in said cause, and to fix and approve the bond herewith submitted, and for such further order as to justice and right may in the premises appertain.

J. Q. A. FELLOWS, *Att'y.*

Writ of error allowed March 31st, 1873.

JOSEPH P. BRADLEY,
Associate Justice Supreme Court of U. S.

(Indorsed:) 3700. Supreme court of La. Joseph Fuentes et als. vs. Myra Clark Gaines. Petition for writ of error. Filed April 7th, 1873. M. R. Julian, depy. clk., sup. court of La.

770 Know all men by these presents, that we, Myra Clark Gaines, as principal, and J. Q. A. Fellows and Sam'l M. Todd, as sureties, are held and firmly bound unto Joseph Fuentes, Theodore Gayol, Jules La-

pine, Marceline Esnard, D. B. Macarty, P. O. Peyroux, Owen Dougherty, Albin Soulie, Forvelle Foy, G. Lavisseur, M. A. Lavisseur, M. Meilleur, F. M. Jacobs, P. Avril, Francis Mouney, N. Rilleur, Mrs. E. Vance, Alfred Rousseau, testamentary executor of the estate of Rodolphe Rousseau; Mrs. S. Morel and her husband O. Morel, herein aiding and assisting; George Bischof, Albin Rouchereau, S. E. Brunet, J. A. Blanc, J. L. Gubernator, François LaCroix, V. Demourville, W. F. Vredenbergh, The city of New Orleans, a corporation created by the laws of the State of Louisiana; David Stickney, Ferdinand Thompson, Alphonse Drez, Mrs. Simeon Delord, herein authorized and assisted by her husband; Joseph Guillotte, John Despeau, J. Hoa, J. Hernandez, Jules Lavergne, Louis Mestier, J. Bernard, R. Rousselot, A. B. Griswold, R. J. Kerr, J. B. Slawson, J. C. de St. Romes, P. H. Monsseaux, C. Morel, M. Largue, B. Abadie, Pierre Minovelle, J. T. D. Leferbe, M. J. Lizardi, Raymond Carite, Cassemer Carite, Jas. L. Swan, J. Dauphine, H. Dauphine, M. de Liano, T. Robertson, V. Baccus, P. Brunett, J. M. Brunett, William Crepple, P. Pasquer, R. Massona, N. Dabon, J. J. Lamonie, M. Gueno, A. Baumgarten, Pierre Sherry, N. Logue, J. François, Widow George Pirelloux, Mellina Ross; and Rudolphe Huberwald, Bernard Saloy, Mrs. Mathews, in her own right and as tutrix of her five minor children; John Henry Smith, Palmyra Gravier, L. D. Kernon, John Maginnes, Theodore Mararo, William H. Johnson, Mrs. Mary Martin, administratrix of the estate of Joseph Prader; Mr. & Mrs. Rülele, John & James C. Davidson, William A. Elmore, in his own right & as tutor to his minor children, Florence, Franklin, Henry & Minor M. Elmore; Fanny Montgomery, aided by her husband Edward Montgomery; William W. Minor, & Mrs. Myra F. Minor, Adolphe Sigur, tutor to Achille Sigur; Henry D. Minor, for himself and as tutor to the minor children of John L. Minor & Mrs. L. D. Minor, deceased, to wit, George, John and Sidney Minor, in the full and just sum of two thousand dollars, to be paid to the said Joseph Fuentes and others above-named & all others in interest or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 31st day of March, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas lately at a session of the supreme court of the State of Louisiana, held at New Orleans, the day of March, 1873, in a suit depending in said supreme court, wherein Joseph Fuentes and others herein above named were plaintiffs, and Myra Clark Gaines was defendant, a judgment was rendered against the said Myra Clark Gaines, defendant; and the said Myra Clark Gaines having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph Fuentes, and others hereinbefore named, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such, that if the said Myra Clark Gaines shall prosecute her writ to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

J. Q. A. FELLOWS, [L. S.]
For Plaintiff in Writ.
J. Q. A. FELLOWS. [L. S.]
SAM'L M. TODD. [L. S.]

(Indorsed:) Supreme court of Louisiana. No. 3700. Joseph Fuentes et al. vs. Myra Clark Gaines. Bond for writ of error. Filed April 7, 1873. M. P. Julian, depy. clerk. Sup. court, State of La.

Bond approved March 31st, 1873.

JOSEPH P. BRADLEY,
Asst. Just. Sup. Ct. U. S.

771 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Louisiana, and holding sessions in the city of New Orleans, & Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit of Joseph Fuentes, Theodore Gayol, Jules Lapine, Marceline Esnard, D. B. Macarty, P. O. Peyroux, Owen Dougherty, Albin Soulie, Forville Foy, G. Lavisseur, M. A. Lavisseur, M. Meilleur, F. M. Jacobs, P. Avril, Francis Mouney, N. Rilleur, Mrs. E. Vance, Alfred Rousseau, testamentary executor of the estate of Rodolphe Rousseau, Mrs. S. Morel and her husband, O. Morel, herein aiding and assisting; George Bischof, Alben Rouchereau, S. E. Brunet, J. A. Blanc, J. L. Gubernator, François Lacroix, V. Demourville, W. F. Vredenbergh, The City of New Orleans, a corporation created by the laws of the State of Louisiana; David Stickney, Ferdinand Thompson, Alphonse Drez, Mrs. Simeon Delord, herein authorized and assisted by her husband; Joseph Guillotte, John Despeau, J. Hoa, J. Hernandez, Jules Lavergne, Louis Mestier, J. Bernard, R. Rousselot, A. B. Griswold, R. J. Kerr, J. B. Slowson, J. C. de St. Romes, P. H. Monsseaux, C. Morel, M. Largue, B. Abadie, Pierre Minoville, J. T. D. Lefebre, M. J. Lizardi, Raymond Carite, Casmier Carite, Jas. L. Swan, J. Dauphine, H. Dauphine, M. de Liano, T. Robertson, V. Baccus, P. Brunett, J. M. Brunett, William Creppel, P. Pesquier, R. Massana, N. Dabon, J. J. Lamoine, M. Gueno, A. Baumgarten, Pierre Sherry, N. Louque, J. François, Widow George Perrilloux, Mellina Ross, and Rudolphe Huberwald, Bernard Saloy, Mrs. Mathews, in her own right and as tutrix of her five minor children; John Henry Smith, Palmyra Gravier, L. D. Kernon, John Maginnis, Theodore Morano, William H. Johnson, Mrs. Mary Martin, administratrix of the estate of Joseph Prader; Mrs. & Mrs. J. Rüele, John & James C. Davidson, William A. Elmore, in his own right and as tutor to his minor children Florence, Franklin, Henry, & Miner M. Elmore; Fanny Montgomery, aided by her husband, Edward Montgomery; William W. Miner and Mrs. Myra F. Miner, Adolphe Sigur, tutor to Achille Sigur; Henry D. Miner, for himself and as tutor to the minor children of John L. Miner & Mrs. L. D. Miner, deceased, to wit, George, John, & Sidney Miner, plaintiffs & intervenors, and Myra Clark Gaines was defendant, a manifest error hath happened, to the great damage of the said Myra Clark Gaines, as by her complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record

and proceedings aforesaid being inspected, the said Supreme Court cause further to be done therein to correct that error what of right and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief-Justice of the said Supreme Court of the United States, this 31st day of March, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

772 (Indorsed:) Supreme court of Louisiana. No. 3700. Joseph Fuentes et als. versus Myra Clark Gaines. Writ of error. Allowed March 31st, 1873. Sup. court of La. Filed April 7th, 1873. M. P. Julian, depy. clk.

Allowed March 31st, 1873.

JOSEPH P. BRADLEY,
Ass. Just. Sup. Ct. U. S.

773 THE UNITED STATES OF AMERICA,

Supreme court of the State of Louisiana.

The President of the United States to Joseph Fuentes, Theodore Gayol, Jules Lapene, Marceline Esnard, D. B. Macarty, P. O. Peyroux, Owen Dougherty, Albin Soulie, Forville Foy, G. Lavesseur, M. A. Lavesseur M. Meilleur, F. M. Jacobs, P. Avril, François Mouney, N. Relleur, Mrs. E. Vance, Alfred Rousseau, testamentary executor of the estate of Rodolphe Rousseau; M. S. Morel, and her husband, O. Morel, aiding and assisting; George Bischof, Albin Rouchereau, S. E. Brunet, J. A. Blanc, J. L. Gubernator, François Lacroix, V. Demonville, W. F. Vredenbergh, The City of New Orleans, a corporation created by the laws of the State of Louisiana; David Stickney, Ferdinand Thompson, Alphonse Drez, Mrs. Simeon Delord, herein authorized and assisted by her husband; Joseph Guillotte, John Despeau, J. Hoa, J. Hernandez, Jules Lavergne, Louis Mestier, J. Bernard, R. Rousselot, A. B. Griswold, R. J. Kerr, J. B. Slawson, J. C. de St. Romes, P. H. Monsseaux, C. Morel, M. Larque, B. Abadie, Pierre Menovelle, T. D. Lafebre, M. J. Lizardi, Raymond Carite, Casmere Carite, Jas. L. Swan, J. Dauphine, H. Dauphine, M. de Liano, T. Robertson, V. Baccus, P. Brunett, J. M. Brunett, William Creppel, P. Pasquier, R. Massina, N. Dabon, J. J. Lamonie, M. Gueno, A. Baumgarten, Pierre Sherry, N. Loque, J. François, Widow George Perrelloux, Melina Ross; and Rudolphe Huberwald, Bernard Saloy, Mrs. Mathews, in her own right, and as tutrix to her five minor children; John Henry Smith, Palmyra Gravier, L. D. Kernon, John Maginnis, Theodore Marero, William H. Johnson, Mrs. Mary Martin, administratrix of the estate of Joseph Prader; Mr. & Mrs. J. Rülele, John and James C. Davidson, William A. Elmore, in his own right and as tutor to his minor children, Florence, Franklin, Henry, & Miner M. Elmore; Fanny Montgomery, aided by her husband, Edward Montgomery; William W. Miner, and Mrs. Myra F. Miner, Adolphe Sigur, tutor to Achille Sigur; Henry D. Miner, for himself and as tutor to the minor children of John L. Miner & Mrs. L. D. Miner, deceased, to wit, George, John, and Sidney Miner, defendants and intervenors, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein Myra Clark Gaines plaintiff in error and you are defendants, to show cause, if any there be, why the judgment rendered against the said plaintiff, Myra Clark Gaines, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this 31st day of March, in the year of our Lord one thousand eight hundred and seventy-three.

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court U. States.

774 (Indorsed:) Supreme court of Louisiana. No. 3700. Joseph Fuentes et als. vs. Myra Clark Gaines. Citation.

Marshal's return.

Received April 17, '73, by the U. S. marshal, and on the same day, month, and year served a copy of the within citation in error on the within-named parties, defendants in error, by delivering the same to each of their attorneys, as follows: On John H. Kennard, esq., personally; on W. A. Elmore, esq., personally; on James McConnell, esq., personally; and on the 18th April, 1873, served a like copy on J. D. Hill, esq., personally.

New Orleans, La., April 24, 1873.

S. W. REED,
Dpy. U. S. Marshal.

(Indorsement on cover:) No. 330. Myra Clark Gaines, plaintiff in error, vs. Joseph Fuentes et al. Louisiana sup. ct. Filed 8th November, 1873.

Supreme Court of the United States.

MYRA CLARKE GAINES, Plaintiff in Error,
vs.
JOSEPH FUENTES *et al.*
No. 104.

POINTS FOR THE PLAINTIFF.

BY GEO. W. PASCHAL.

I.

The fact should not be overlooked that this case comes here under the principle of the 25th section of the judiciary act, as amended and re-enacted by the Lawrence act of 1867. (Rev. Stat. sec. 709.)

And although the Supreme Court of Louisiana seems to have avoided any decision in words upon the repeated applications to transfer the cause to the Circuit Court of the United States, and which were overruled by the District Court, yet it could not have retained its jurisdiction without affirming said denial of transfer. There was the decision against the act of Congress; and the correctness of that ruling is the principal question before this court. That the question is fairly presented, is fairly ruled in the case of Craig *v.* Missouri, 4 Peters, 410; 9 Curtis, 117; Murdock *v.* Memphis, 20 Wall., 614.) The point was necessarily presented.

The several acts of Congress necessarily connect themselves with art. III, sec. 2, clause 1, of the Constitution.

"The judicial shall extend to all *cases* in law and equity arising under this Constitution, the laws of the United States," &c. But after an enumeration, the word "*cases*" is dropped, and "*controversies*" "between citizens of different States" is employed. It was therefore in the power of Congress to have transferred all such controversies, to the exclusion of the States, to the federal courts, without regard to the amount in controversy. But by sec. 11 of the judiciary act the jurisdiction is given concurrently with the States, and the amount in controversy must exceed $500. As such concurrent jurisdiction alone would have somewhat impaired the constitutional rights of citizens of the different States, the 12th section for the transfer of causes was enacted. It has been urged in this case that the two sections are identical, and that no cause can be transferred which could not have been originally brought under the 11th section; but Mr. Justice Story, in the very case relied upon, (Smith *v.* Rinds, 2 Sumner, 344,) points out the differences between the two sections.

As these acts are fully quoted in other briefs in the cause, it is only necessary to give the following summary:

Section 12 of the judiciary act of 1789 declares that "if *a suit* be commenced in a State court against a citizen of another State," &c., the cause may be transferred in accordance with the provisions of the Statute. (1 St. 79; 1 Brightly's Dig., p. 128, sec. 19.) Section 1 of the act of 27th July, 1866, says: "If any suit," &c., and provides for a severance. (14 St., 306; 2 Brightly, p. 114, sec. 15.)

In the first act the motion to transfer must be made at the time of entering the appearance; in the second it may be made at any time before the trial. Section 1 of the act of 2d March, 1867, returns to the language "a suit," and it provides for the change on account of apprehended prejudice. And upon complying with the conditions of the act it is made the duty of the State court "to proceed no further in the suit." There is no discretion left to the judge. (14 St., 558; 2 Brightly, p. 116, sec. 17.)

II.

The whole argument against the transfer, as we find it in arguments here, the opinions in the record, and in Furentes *v.* Gaines, 1 Woods, 112, proceeds upon the theory that the court in which the suit was brought alone had jurisdiction of the controversy involved, or else that the subject matter of the suit was of a character which the probate court alone could adjudicate; one that could not have been originally brought under the 11th section of the judiciary act, and therefore could not be transferred under the 12th. But as to the first proposition of exclusive jurisdiction in the State court, it is fully answered in Cowles *v.* Mercer county, 7 Wallace, 121, and in the fuller review of Mr. Justice Davis, in Paine *v.* Hooker, 7 Wall, 429.

Mr. Justice Davis said: "The theory of the position is this, that a Federal court of chancery, sitting in Missouri, will not enforce demands against an administrator or executor if the court of the State, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local court of probate, she has no better or different rights because she happens to be a citizen of Virginia.

If this position could be maintained, an important part of the jurisdiction conferred on the Federal court by the Constitution and laws of Congress would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal, of what value would that right be if the court in which the suit was instituted could not proceed to judgment and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this court, and overruled.

We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribed the modes of redress in their courts or which regulate the distribution of their judicial power. (Hyde *v.* Stone, 20 How., 175; Suydam *v.* Broadnax, 14 Peters, 67; Union Bank *v.* Jolly's Administrators, 18 How., 503.)

If legal remedies are sometimes modified to suit the changes in the laws of the States and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses; is subject neither to limitation or restraint by State legislation, and is uniform throughout the different States of the Union. (Green's Administratrix *v.* Creighton, 23 How., 90; Robinson *v.* Campbell, 3 Wheat., 212; United States *v.* Howland, 4 Wheat., 108; Pratt *et al. v.* Northam *et al.*, 5 Mason, 95.)

The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case as disclosed in the pleading. (Watson *v.* Sutherland, 5 Wall., 78; Smith *v.* Smith, 11 Tex., 102.

And in a well-considered case of Twitchell *v.* United States, 7 Wall, 324, the Chief of Justice, speaking of the transfer of causes under the 25th section, said: "Neither the act of 1789, nor the act of 1867, which, in some particulars, supersedes and replaces the act of 1789, makes any distinction between civil and criminal cases, in respect to the revision of the judgment of State courts by this court; nor are we aware that it has ever been contended that any

such distinction exists. Certainly none has been recognized here." And if this be true as to the 25th section, certainly it cannot be doubted as to the 12th section, and the amendatory acts of 1866 and 1867. They intimate no distinction as to the subject matter, for the obvious reason that the parties alone give the jurisdiction. It may be admitted that the conclusion from the whole cases decided by this court, and other courts upon these acts, have established that a case could not be transferred under the 11th section, unless all the defendants were in a condition to ask, and did ask the transfer. To obviate this evil, the act of 1867 was passed, which allowed a severance, and the amendatory act of 1867 gives the right of removal to either party in any case where there is a controversy between citizens of two States, upon oath that the party believes that, from prejudice and local influence, he will not be able to obtain justice in such State court. And I am not aware of any case where a refusal to transfer has been sustained because of the character of the controversy. Nor do I admit that, in a case like the present, any discretion such as was exercised here is left to the judge. Smith *v.* Rinds, 2 Sumner, 344. This case only involved the question as to whether one of several defendants could transfer the cause independently of the others. The review of Strawbridge *v.* Curtis, 3 Cranch, 267, was uncalled for, and was only authority by analogy. The case of Beardsley *v.* Torrey, 4 Wash. Circuit Court, 286, is admitted to be correct within the sense of the case, but inaccurate in not admitting a distinction between sections 11 and 12. And finally the whole decision turned upon the citizenship of the grantees.

Discretion.

In Gordon *v.* Longest, 6 Pet., 103, it is said: "It must appear to the satisfaction of the State court that the defendant is an alien or a citizen of some other State than that in which the suit is brought, and that the matter in controversy, exclusive of costs, exceeds five hundred dollars." Here the appellees state in their bill that the ap-

pellant is a citizen of New York, and they citizens of Louisiana. The appellee swears the same thing, and about it there was no controversy. And the complainants having averred it, there could be none about the value in controversy. Nothing else is left to the judgment of the court by the statutes.

It was then "the duty of the court to proceed no further. And every step taken subsequently in the exercise of jurisdiction in the case, whether in the same court or in the Court of Appeals, was *coram non judici.* (Id., 104.)

In Ladd *v.* Tudor, 3 W. & M., 325, all that is said about discretion is confined to the two questions of citizenship and the amount in controversy. The *mandamus* was denied because the sum in controversy did not exceed $500. The power was also questioned.

In Gordon *v.* Longest, 16 Pet., 97, the motion was made in due order, but the motion being refused, the bond was not actually filed as in our case. The denial of the motion was assigned for error, but in the opinion the court of appeals did not notice this error. (Id., 103.) Jurisdiction was exercised under the 25th section without question.

But when Mr. Justice Miller came to treat a case under the act of 1867, his argument certainly led to the conclusion that the only questions for the consideration of the State judge are, 1. The sufficiency of the affidavit. 2. The residence of the parties. 3. The amount in controversy. 4. That the citizenship of the applicant may be acquired at any time before the trial of the cause. No case has yet decided that the judge to whom the application is made may consider the character of the suits in answer to the motion. (Johnson *v.* Monell, Woolworth's C. C. Reports, 393–399.)

III.

But what was the character of the controversy? It was a suit founded upon the code of practice of Louisiana for the nullity of a judgment establishing a will, or else (which is more reasonable) it was a suit in the nature of a bill,

alleging fraud, false evidence, and suppression of evidence, and praying that the judgment be canceled and annulled. But whether it rested properly upon the code of justice or not, its object was to destroy a judgment rendered at law. Such a suit is clearly an object of equity jurisdiction. It is in fact a case in equity; and therefore, whether brought in one court or another, it came under the classification of the judiciary act, and, as such, was as properly the subject of transfer as would have been any other suit seeking equitable relief.

It was not an original suit for the establishment of a will; but a bill to cancel a judgment, which the complainants alleged stood in the way of their rights. Such a bill might have been brought under the 11th section of the judiciary act.

IV.

Feeling the full force of the denial of their motion to dismiss the appeal for want of jurisdiction—a motion which covered the whole grounds of their defense—the appellees, with seeming confidence, cite the Broderick will case, 21 Wall., 509, as a precedent. Let us admit the soundness of the principle that a court of equity will not generally entertain jurisdiction of a bill to set aside a will or the probate thereof, and does it follow that the cause should not have been transferred?

If this be so, it would seem to result that whenever such an application is made, it would be the duty of the court to examine the bill or declaration, and if it appears that a demurrer would lie, and the suit be dismissed, the motion must be denied.

However sound may be the decision in the Broderick will case, some of the reasons given are not sustained by the general statutes and practice. Thus the assumption "that courts invested with this probate jurisdiction should have ample powers, both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality," may

be true as to what the law ought to be, but, as a rule, the law is not so. Generally wills are admitted to probate, after the publication of a general notice, and generally without contestation. Then there is a time prescribed, generally from three to five years, within which heirs claiming against the will may come into another jurisdiction, (a court of equity wherever it exists,) and attack the will for fraud, perjury, or forgery. All such attacks are purely matters of equity jurisdiction, although the power may be given by statute to one tribunal or another.

I do not understand that it is claimed that this suit was brought under the peculiar statute of Louisiana, which allows a suit for the nullity of a judgment. Such suits were between parties and their privies. But they never extended to the parish or probate courts.

The brief of counsel shows that the action is not founded on the Louisiana laws, but upon the reasoning and dicta of the judges who have delivered opinions in the Gaines' cases. But these learned judges did not intend to abolish statutes, nor to make law or change general principles.

In the State of Louisiana there is no court of equity; and wherever the suit might have been brought, the statement and relief prayed would have been the same.

V.

Some reliance seems to be placed upon the conclusions of Mr. Justice Miller in Murdock *v.* Memphis, 20 Wallace, 635. But if the court shall be of opinion that the State court erred as to the transfer of the cause, we have nothing to fear as to the other matters decided in the cause.

Respectfully submitted,

GEO. W. PASCHAL.

Supreme Court of the United States.

MYRA CLARK GAINES, Plaintiff in Error

versus No. 104.

JOSEPH FUENTES ET AL., Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

MYRA CLARK GAINES, PLAINTIFF IN ERROR,

versus No. 104.

JOSEPH FUENTES ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

The litigation in which the plaintiff has been engaged for more than forty years to recover the estate of her father, has, by reason of the great obstacles she has had to encounter, as well as the interesting questions presented, attracted general attention. Her cases have now become historical, and the present cause, in which without any new testimony, the well settled decisions of this court, and those of the Supreme Court of Louisiana, after an acquiescence therein for nearly twenty years, are, upon a technical point of the extremest tenuity, overthrown, does not tend to diminish its interest, especially to those who have been accustomed to think there was anything stable in judicial decisions.

This high court, after a most profound investigation of every question of fact and law involved in the present

case, said, at the December term, 1860, of plaintiff's right, these significant words: "Thus, after a litigation of thirty years, has this court adjudicated the principles applicable to her rights in her father's estate. THEY ARE NOW FINALLY SETTLED." 24 Howard, 614.

Again, this court seven years later, in a case against one or more of the defendants in this case, after another exhaustive re-examination of the same questions, said: "The questions of law and fact applicable to those rights were determined in the case of Gaines vs. Hennen. After argument by able counsel and on mature consideration, we have affirmed that decision. Can we not indulge the hope that the rights of Myra Clark Gaines in the estate of her father will *now* be recognized?" Gaines vs. New Orleans, 6 Wal., 718. See also Gaines vs. De La Croix, 6 Wal., 719.

Again, in 1873, this court enforced the former judgment against the city of New Orleans. See 15 Wallace, p. 624.

It is the overthrow of these decisions, not only as it respects third persons, but as to the very parties to the suits wherein the judgments were rendered, that has brought this case another time before this court.

The numerous times these questions have been discussed before this court will enable counsel to state more briefly than otherwise the facts of the case.

The facts of the case as presented before Judge Lea, in the Second District Court of New Orleans, in 1855,

and before this court in 1860, have never been successfully controverted. Judge Collins, an elective judge who decided this cause in the lower court, being in a community hostile to plaintiff, said: "III. On the question whether or not Clark did make and leave a will dated and signed by himself subsequent to that of May 20th, 1811, I concur in the opinion delivered by Judge Lea when the matter was first tried in this court. After stating the evidence, which is unnecessary to recapitulate again, and which fully sustains this view, he says: 'I now think there is no doubt, setting aside the testimony of Mrs. William Harper and Bellechasse, that Clark did execute a will shortly before his death; that the principal object in making this will was to recognize as his daughter the present applicant (Myra C. Gaines) and to make suitable provision for her; that the executors of that will were Pitot, Bellechasse, and Delacroix, and that Delacroix was appointed tutor to his daughter, Myra; that his will must have been in existence until within a very short time previous to Clark's death, if not after that event, and Clark himself died believing it was in existence.' True, much new evidence has been adduced of which Judge Lea did not have the benefit. Some of this evidence, indeed, tends to a different conclusion, but not with sufficient force to shake his opinion materially. *On the whole, it is well sustained by the evidence as it now stands.*"

The execution and existence of the will of 1813 was admitted by all the judges of the Supreme Court of Lou-

isiana taking part in the decision of the case. One, however, Judge Lea, doubted the admissability of secondary evidence to establish the will of 1813. The other judges, believing that secondary evidence was admissable under the law of Louisiana, and finding the proof ample, ordered the will to probate Succession of Clark, 11 An., 124.

Certain suits were within the time allowed by the law for the prescription of wills (viz., five years) brought by Delacroix, the father of one of the defendants in error, and the mother of Daniel Clark. They were, however, abandoned, and for more than thirteen years the plaintiff held and enjoyed, unchallenged against all the world, the *status* of legal heir and universal legatee.

On the 27th day of May, 1869, Joseph Fuentes and a number of other parties, including the city of New Orleans and Delacroix, filed in the Probate Court of New Orleans a petition which they caused to be served on the plaintiff in error on the 31st day of the same month. The instrument is signed by J. McConnell, Esq., who has been engaged as counsel, either as a partner of Mr. Duncan or individually, since 1855, in nearly all the cases of Mrs. Gaines in the State and National courts. After various recitals, the main allegations are contained in the following quotations, which we emphasize by italics, viz.:

"Now your petitioners represent that the said probate of the said pretended will of July 13th, 1813, was *a gross fraud* upon the rights of these petitioners; that

the said pretended will never existed ; that *the evidence and testimony* of the witnesses upon which the same was admitted to probate *was false or erroneous, illegal and insufficient ; that if any will* was made by the said Daniel Clark at any time other than the one admitted to probate and ordered to be executed by a decree of this court dated on the 17th day Augnst, 1813, which is expressly denied, it *was destroyed or suppressed by the said Daniel Clark* himself; that the said Daniel Clark left no will whatever posterior to that dated May 20th, 1811, which was probated, as above stated, in this court August 17th, 1813, and by which Mrs. Mary Clark, who was his mother, and his sole and legal heir, was instituted his universal legatee, and which probate and will remained in force nearly half a century as the basis of title to the property of his succession. And your petitioners further represent that the said Daniel Clark *was never married* and *had no legitimate child;* that he did not recognize the said Myra as his legitimate and only child, as is set forth in the said pretended will of 1813, *but, on the contrary, he, the said Clark, actually made ample provision* for her *as his illegitimate child* by secret and confidential trusts, whereby he left property for her in the custody of her friends, which trusts have been duly executed, she having received the property thus left to her ; that the said Daniel Clark *did not make and could not have made a will in favor of the said Myra, because of her status;* she being the issue of an adulterous connection, was *without the legal capacity of inheriting or receiv-*

ing by last will from the said Clark." Printed Record, p. 2, No. 6.

The plaintiffs being required to specify in what the gross fraud and false testimony consisted, amend their petition, and say it was a gross fraud upon plaintiff's rights, "because important testimony and evidence well known to said defendant and under her control was withheld and suppressed which, if offered, would have caused the rejection of the demand of said order of probate."

Now, anywhere else but in this prejudiced community, the pretence that a party was obliged to offer in evidence parts of her adversaries' pleadings, and testimony contested by her as false, and disproved by her in other courts, and on other occasions, and under other issues, would create a smile, but here follows in solemn earnest the specifications, viz.: "That among other evidence and testimony of that character, petitioners refer to and specify the following, viz.:

The testimony of Francois Dussu de la Croix, on file in this court, taken Sept. 28, 1835, in suit No. 843, entitled Whitney and Wife (the present defendant) E. O. Bearen et al. The answers under oath made by Richard Relf and Beverly Chew, in suit No. 122, in the CIRCUIT COURT OF THE UNITED STATES, for Distcict of Louisiana, at the instance of the said defendant herein, in a bill of discovery, etc., etc.

"The deposition of D. W. Cox and exhibits thereto annexed, taken in said *suit No.* 122, on the 25th of Au-

gust, 1849, when the issue was the making and existence of said alleged will of 1813, as above stated, and was also in evidence in said suits 2619, 2695 and 2734" (in the United States Circuit Court), etc.

"The testimony of the witness Bellechasse is *false*, being contradicted by declarations in his own *letters* on file as evidence in suits 2619, 2734 and 2695, in the *Circuit Court* of the United States, District of Louisiana, which letters were written shortly after the death of said Daniel Clark."

"The testimony of the witness, Davis, is contradicted by the record in suit No. 1540, brought by him on the 24th June, 1817, in the then District Court for the First Judicial District of Louisiana, in which, as tutor ad litem of said defendant, he claimed from said executors, Relf and Chew, alimony for said defendant as the natural child of Daniel Clark."

"The testimony of the witness is contradicted and her credibility impeached by the testimony of Peter A. Brown, of Philadelphia, whose testimony was taken contradictorily between said defendant and sundry of the plaintiffs herein in the said suits 2734 and 2695 (in the United States Circuit Court), and that in so far as the said witness was sought to be made a witness to said alleged will of 1813, she was absolutely incapable in law to testify."

"That not one of the witnesses attested that recognized the testament, or that they recollected the said alleged last will as being entirely written, dated and

signed in the handwriting as having often seen him write and sign during his life-time, as the law required." That the will spoken of was an unsigned project submitted to counsel, who advised against it; that Clark made secret trusts for defendant, '*as his illegitimate child*," etc.

"Petitioners further say that said D. Clark left no will dated 1813, as is pretended; but that if he did, which they deny, then they aver that the same was and is null and void, for the reasons stated in the petition, and for the further reasons, *was never married to the mother of the said defendant Myra.*" Then follow certain long allegations *and arguments* to show that the defendant was illegitimate and incapable of taking under the will. Record 48 to 50.

Therefore petitioners pray that judgment may be rendered revoking the said pretended will of July 12, 1813, and recalling the said decree of probate thereof as absolutely void and no effect in law. Petitioners pray for all other relief and remedy the nature of the case may require and that may pertain to law and equity.—Pages 3 and 50. At the proper time two attempts were made to remove the cause to the Circuit Court, and proof, bonds and security tendered, as required by the acts of Congress, One application was under the act of Congress p. 1789, and the other under the act of Congress approved March 2d, 1867, wherein Mrs. Gaines swears that she has reason to and does *believe that from prejudice and local influence* she will not

be able to obtain justice in the State Court. Record pp. 4, 10, 12, 24.

Certain parties having intervened, setting up same allegations as Fuentes and others in the suit, in order to prevent any question as to her right, defendant renewed her petition, etc., for a removal to the Circuit Court of the United States. This was refused. Record p. 57. See intervention, 51, 54.

The case of the plaintiff in error against the city of New Orleans and others, decided by this Honorable Court, in the 6th Wallace, p. 718, was pleaded in bar of the present suit and the plea refused. Record pp. 17, 67.

The answer is the general issue, an averment of the validity of the will of 1813, and the plea of prescription of one, three, five and ten years. Page 64.

Various bills of exception were taken, none of which it is necessary to note, except that as to the introduction in evidence the answers of Richard Relf and Beverly Chew, taken in the United States Circuit Court, as authorized by the decision of this court in that case. Plaintiff in error contending that it is a misapprehension of the ruling of this court in that case. Record pp. — and 197.

The case was tried in the lower court, and Judge Collins, an elective judge, as we have said, was constrained to admit, as we have already shown, that the will of 1813 was sufficiently proven. In another place he says: "When we consider the affection Clark

evinced for Myra, his statements to Mazureau, Miller and others, as well as Samuel Davis and others, it is not to be doubted that his will contained at least the most advantageous dispositions he could lawfully make in her favor. Record p. 161.

But he holds that the marriage was disproved, and that therefore Clark could not have made a will in favor of his illegitimate child. Record pp. 152, 163.

But as this court had already declared the status of the plaintiff in error in a final decision between her and several of the defendants in error, it might seem a dangerous ground for the case to rest upon. Would that stand on a writ of error to the Supreme Court of the United States? Could not a safer ground be found? Every fact had been discussed before the Supreme Court of the United States, but a majority of the Justices of that court had concurred as to the facts with Judge Lea, with the former bench of Louisiana, and with Judge Collins himself.

The Supreme Court of Louisiana, one of its Judges dissenting, found a new ground to rest the case upon, in substance, viz.: That none of the witnesses had sworn on what particular day in July, 1813, the will bore date, and therefore it was not valid—p. 205 (748)—and so the case could be decided by that court without touching the question of status. Whoever heard before that it was necessary in proving a lost instrument to prove the precise date it bore? What memory is so tenacious as to remember the precise date

a promissory note or an ancient deed may bear, and yet how easy to remember that it had a date. The question was, Was the will dated? *If it was*, it was of no consequence whether it was dated the 13th or 15th or any other day of the month.

Mrs. Gaines, fearing the effects of prejudice on her case, had taken the precaution to avail herself of the broad terms of the act of Congress of the 2d of March, 1867. This act provided:

"That where a SUIT *is now pending*, or may hereafter be qrought, in ANY State court in which there is a CONTROVERSY between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State eourt an affidavit stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such State court, may, at any time before final hearing or trial of the suit, file a petition in such State court for removal."

This statute, it will be perceived, exhausts the entire power conferred by the Federal Constitution, and confers on the courts the right to try, not only cases *at law or equity*, but suits in ANY State court in which there is a CONTROVERSY, etc.

The necessity and reason for this enactment of Congress during all the turbulent times of reconstruction,

could not be more forcibly demonstrated and shown, it will be seen in the sequel, than by reference to this extraordinary case itself The statute ought to have been passed had there been no other case than this to which it could apply. Without, however, consuming more time of the court in stating the case, we will proceed to make the assignment of errors, in conformity with the rules of this court.

ASSIGNMENT OF ERRORS

I. The Supreme Court of the State of Louisiana erred in affirming the decision of the Second District Court for the parish of Orleans, refusing the prayer of the petitions of the plaintiff in error, to remove the suit into the Circuit Court of the United States for the District of Louisiana, and denying the right of the plaintiff in error to have said cause removed into said Circuit Court, under the acts of Congress in such cases made and provided, and in overruling the first assignment of errors, found on the 186th page of the printed record, and in assuming jurisdiction of the case to try the same after her said application had been made, with tender of sufficient bonds and with full compliance with the acts of Congress.

II. The said Supreme Court of the State of Louisiana erred in denying in this case the force of the thing adjudged and the effect of *res judicata* to the decrees of the Supreme Court of the United States as carried into

effect by the decree of the Circuit Court of the United States, in the cases of Myra Clark Gaines, the plaintiff in error, against the city of New Orleans, No. —— of said Circuit Court, and said Myra Clark Gaines against said H. Delacroix, No. —— of said Circuit Court, and said Myra Clark Gaines against M. J. Lizardi, No. —— of said Circuit Court of the United States, and Myra Clark Gaines against H. Dauphin, J. Dauphin, N. Debon, J. J. Lamine, R. Messene, No. —— of said Circuit Court of the United States, and in overruling plaintiff in error's said plea of res judicata, contained in said transcript. and in affirming that there was no error in the ruling of the said Second District Court for the parish of Orleans, in overruling said pleas of res judicata of the plaintiff in error, based on the decrees of this and said Circuit Court, found in the record and referred to in the 4th assignment of error before said Supreme Court of Louisiana, found on page 187 of the printed record.

III. The said Supreme Court of Louisiana erred also in affirming the rulings of the said Second District Court for the Parish of Orleans, which denied the force of the decree of the Supreme Court of the United States against Richard Relf and Beverly Chew in the case of plaintiff in error against them, which gave plaintiff in error the option, in the event of a discovery, of the right to offer in evidence the answers of Richard Relf and Beverly Chew in said case, obtained under the authority of said decree, but did not give

the said Relf, nor any other person, the right, as was erroneously held by the court *a qua*, to use said answers as evidence against the plaintiff in error, as is shown by the bill of exceptions on page 90 of the printed record and opinion of the Supreme Court of Louisiana, page 196 of the printed record.

IV. The said Supreme Court of Louisiana erred in affirming the judgment of the Second District Court for the Parish of Orleans generally, whereby the said Supreme Court of Louisiana, in truth and in fact, notwithstanding their reasoning, affirmed the judgment of said Second District Court for the Parish of Orleans, and thus have taken jurisdictiction of the question of status, which transversable matter was, under all circumstances, removable to the Circuit Court of the United States.

V. That the said Supreme Court of Louisiana erred in affirming the judgment of the said Second District Court of Louisiana for the Parish of Orleans, because the status of the plaintiff in error, as a legitimate child of Daniel Clark, had been put at issue, by the defendants in error, by their allegations, and because the plaintiff in error had pleaded, in bar of the re-opening of that question before said prejudiced tribunal, the repeated decisions of the Supreme Court of the United States in the cases of Myra Clark Gaines vs. The City of New Orleans, Myra Clark Gaines vs. Duncan N.

Hennen, as res judicata, and the said Second District Court having expressly overruled said pleas and objections, the Supreme Court of Louisiana, by affirming said judgment of said Second District Court generally, have really and in fact denied the status of the plaintiff in error, as established and decreed by the Supreme Court of the United States, and which were no longer controvertible after said decisions of this Honorable Court.

ARGUMENT, POINTS AND AUTHORITIES.

FIRST. We will first consider the right of removal of the cause into the Circuit Court of the United States for the District of Louisiana under the first assignment of error

An examination of the petition of Fuentes et al. will show that it attacked the probate of the will of 1813 on the ground that "it was a gross fraud upon" petitioners' rights; (Record, page 2;) and after declaring the plaintiff in error to be the illegitimate daughter of Daniel Clark, it was also alleged, 'that said Daniel did not make and could not have made a will in favor of said Myra, because of her status; she being the issue of an adulterous connection, was without legal capacity to inherit." Page 3.

The amended petition sets forth the supposed acts of fraud with more particularity. See page 48.

It will appear by the slightest examination of the petition, that petitioners are not heirs nor legatees, and

that they do not ask to be put in the place of Mrs. Gaines as Clark's universal heir and legatee; they do not claim to be next of kin; they are strangers to the estate who are aware that the next of kin, as alleged by themselves, viz.: the mother of the testator, and even Chew and Relf, have acquiesced in the decree of the decision of the Supreme Court of Louisiana in favor of Mrs. Gaines for thirteen years; but they ask that said will of 1813 should be annulled generally, not only as it affects themselves, but the whole world.

The action was one of nullity, as it is called in Louisiana, for fraud. Many such actions are found in the Louisiana Reports where heirs, executors or legatees have brought the action. This is believed to be the first one where the suit was brought to set aside a will as a muniment of title.

It is well settled that Fuentes and others had the right to bring the action in the courts of ordinary jurisdiction, if it had pleased them to do so.

Reals vs. McKnight, 5 Martin N. S. 9.
Cull vs. Phillips, 6 Martin N. S 304.
Palmer vs. Palmer, 1 L. R. 100.
Casanova vs. Acosta, 1 L. R. 183.
1 L. R. 215.
Sharp vs. Knox, 2 L. R. 23, 25, 26.
Kemp vs. Kemp, 11 L. R. 22.
O'Donogan vs. Knox, 11 L. R. 384.
Trahen's Heirs vs. Arden's Heirs, 11 L. R. 393.
Clark vs. Christine, 12 L. R. 396.

Had the plaintiffs brought their action in the ordinary courts of the State, no one would have doubted Mrs. Gaines' right to remove the suit into the United States Circuit Court, for the cause would have been tried by jury. Could the mere fact that the same action was brought in the Second District Court instead of the Fourth, Fifth or Sixth District Courts prevent her from removing it to the Circuit Court?

If the defendant consented to the removal, why could not the Circuit Court try the cause as well, if removed from the Second District Court as from the Fourth? See Bushnell vs. Kennedy, 9 Wall. 393.

The constitution of the United States is broad enough to cover the one case as well as the other.

A consideration of the provisions of the act of 1789 and a comparison with those just quoted will throw some light on the subject, and notwithstanding the great familiarity this court has with the provisions of the 12th section of the act of 1789, we venture to quote a clause of the same, to compare it with the act of March 2d, 1867.

The 12th section, covering cases which could not have been commenced in the Circuit Court, begins with these words: "*And be it further enacted*, that if a suit be commenced IN ANY State Court against an alien by a citizen, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds," etc.

The act of 1866 allowed certain defendants by swear-

ng, etc., to remove certain suits. 14 Stat. at Large, 306. Neither of these acts seem to have exhausted all the power conferred by the constitution to the United States. The constitution gives the right to extend the judicial power, not to all suits merely, but to all CONTROVERSIES between citizens of different States. The act of 2d March, 1867, as we have seen, allows a removal "where a suit is now pending or may hereafter be brought in any State Court in which THERE IS A CONTROVERSY between a citizen of the State in which the suit is brought and a citizen of another State," etc., and the right of removal is given such citizen of another State whether he be plaintiff or defendant, "IF HE WILL MAKE AND FILE IN SUCH STATE COURT an affidavit stating that he has reason to and does believe that *from prejudice and local influence* he will not be able to obtain justice in such State court."

The case may be removed where there is a "*controversy.*" It is not reasonable to suppose that Congress availed itself of the use of this special word employed in the constitution without intending to use it in the sense of the constitution, and it is evident from the constitution itself that the word *controversy* means more than a suit at law or in equity; for the second section of article III begins by conferring judicial power in certain classes of cases only in *law and equity;* then the language is enlarged to *all cases* affecting ambassadors; *to all* cases of admiralty and maritime jurisdiction; to *controversies* (not merely suits at law or in equity)

between citizens of different States," which would not have been done if it were intended to limit it to merely suits at law or in equity.

This power, granted for the benefit of all the citizens of the Republic, and for the exigences of the future as well as the present, cannot, by any rightful construction, be limited to any particular class of *controversies* such as legal or equitable in the courts. It covers all controversies of a judicial character, however they may arise. A controversy arising in a State court involving the fortune of a citizen of another State, is just as important in one court as another, and it ought not to be in the power of any one to deprive the citizen of a sister State of the right to have his or her case tried in the courts of the nation by selecting one court in preference to another. A suit involving the whole estate of such citizen, wherever it may be brought, is just as important to that citizen as an action of ejectment or a suit in equity.

Did the act of 1867 give the citizen of another State that right? It cannot be denied by any sane man that if a suitor cannot, on account of "prejudice or local influence," obtain justice in the State tribunal, he should not be compelled to lose his estate in one court more than another. Justice abhors "partiality" and "undue influence," which pervert her pure fountains as much in a court of probate as a court of law or a court of chancery. What! shall prejudice take away a man's estate in any form of action which Congress could pre-

vent? Did Congress mean to say that a common law action for over $500 was within its protection and a suit for one hundred thousand in a probate court was not?

The very phraseology of this remarkable statute shows that it was intended to shield the suitor in all "controversies" in "ANY COURT" where "partiality" or undue "local influence" might have clouded the intellect or perverted the understanding of the organs of the law. Justice is to be pronounced only by pure and unsuspected ministers, lest its decisions might be doubted and loathed by good men when declared in places which ought to be free from suspicion. If we look, therefore, to the reason of the law, as authoritatively declared in the act, it covers all sorts of judicial controversies, without distinction of courts.

Such being the reason and intention of the act of Congress, it came to the relief of the suitor in the most efficient manner. It took away all discretion from the courts and allowed each suitor to judge for himself of the necessity of the removal of the cause. *His* convictions were to be the guide. He was not to run the risk of a decision even of *this* question on the part of the prejudiced tribunal, for the prejudiced man is never aware of his prejudices. If he were, and he persisted in pronouncing his prejudiced opinions as judgments, it would be corruption instead of prejudice; and if like question were to be submitted to the control of adverse local influence, this question would be de-

cided against the citizen of another State as well as the merits of the case. Congress, therefore, in order to make sure of the right of the suitor, as under the constitution it was authorized to do, referred it to the citizen of another State to decide for himself whether he would avail himself of his constitutional privilege The act declares that such suitor, a citizen of another State where the matter in dispute is over five hundred dollars, "whether he be plaintiff or defendant, if he will make and file in such" (State) "court an affidavit *stating* that he has reason to and does believe that from prejudice and local influence he will not be able to obtain justice in such State court," he shall have the right to remove the cause. The act says in all cases where the amount in controversy is over $500 the suitor shall be protected. No part of his estate of this value shall be jeopardized by an uncertain minister of justice, blinded by prejudice, or subjected to the hazardous conclusions of that local influence which sometimes constrains with baleful and pressing force the courts themselves. If five hundred and one dollars in dispute *at law or in equity* are protected by the act of Congress, why should not ten or one hundred thousand dollars, if in dispute in a probate court, also be protected? Is there any reason why one should be freed from the control of a prejudiced judge and the other not?

This act of Congress was passed by the same Congress which passed the reconstruction laws, and it is well known that it did not take any half way measures

of protecting whatever rights were in jeopardy. It did not, when it used the broad language of the constitution, mean to screen the suitor from one tribunal and not the others, and it never intended exceptions should be interpolated which are not written in the text. Congress was in earnest, and meant what it said. It used language which clearly embraces, in its most obvious terms, this case. The reason it gives, (one of the most striking, viz., to eliminate from the case the most deadly enemies of justice: prejudice and undue local influence) applies with the greatest force to this case. No case can be imagined where there was a greater necessity for the enforcement of the act. By asking for the removal of the cause, the plaintiff in error consented that the Circuit Court of the United States should pronounce the most ample judgment which these outside parties could ask.

As the case of the plaintiff in error is most clearly within the language of the act of Congress and the reason of the act, we say that it is controlled by the act, and cannot be excepted from its provisions.

But it was argued in the lower courts that the suit could not have been brought originally in the Circuit Court of the United States, and therefore it could not be removed to the Circuit Court of the United States The case of Bushnell vs. Kennedy has since overruled the decisions of the Circuit Courts on this point. The exception does not therefore hold, and it is no longer a criterion of the right to remove the cause.

The ordinary courts of Louisiana have, hundreds of times, declared the decrees of probate courts null in like cases, and there is nothing to prevent, in a case of this kind, the Circuit Court from doing the same thing, if the proof should warrant the decree. Chicago and N. W. R. R. Co. vs. Whitton, 13 Wallace.

We made all the proof that the act of Congress requires to stamp the tribunals which have had this case with prejudice, and we have therefore the right and warrant of law to assume that they were predjudiced, and that all their acts in the cause are *coram non judice* and null. The prejudiced garbling of bills of exception by the judge after they were agreed to by both counsels, was null. The overruling of the solemn judgment of the Supreme Court of Louisiana on the sheerest quibble in this very case on the same facts, are null; its insinuation that this Court had rendered its most elaborate decisions on "aside gossip," was null; its disregard of all its long line of peremptory decisions on the questions of prescription was null, and its studied attempt, disregarding the issues made by the pleadings to place the case on some ground which could not be reached by this Court, (while, if affirmed the judgment of the Second District Court) was null.

The prejudice which has surrounded this case on every occasion has been manifest to this Court, and on a former occasion it felt it its duty to say:

"The circumstances under which this will was recognized are peculiar, and entitle the court which pronounced it valid to the tribute of our admiration. It was proved by the memory of witnesses, forty-three years after it was made, in the height of the litigation instituted by Mrs. Gaines to obtain possession of her father's estate; but, notwithstanding the effect of the probate of it was to recall the will of 1811, and endanger titles acquired under it, so strong was the proof of its authenticity, and so complete the evidence of its contents that a court administering justice in the midst of a people claiming rights hostile to it, did not hesitate to order it to be recorded and executed as the last will and testament of Daniel Clark."

6 Wallace, 699.

See also Chicago and N. W. R. R. Co. vs Whiton, 13 Wallace, p.

See also Insurance Co. vs. Morse, 20 Wallace, 445.

SECOND. The judgments which we have pleaded and produced, of this Court, carried into effect by the Circuit Court against the city of New Orleans, Delacroix and other defendants in error, have forever settled the fact, as between them and the plaintiff in error, that Myra Clark Gaines is the sole LEGITIMATE HEIR and UNIVERSAL LEGATEE of Daniel Clark. That question could not lawfully be raised again between the parties in any court, State or United States, of this nation. Dupasseur vs. Rochereau, 21 Wallace, shows that the question we here raise is within the jurisdiction of this Court.

It is not at all doubtful, if precedents are of the least weight, that the Supreme Court of Louisiana erred in denying the authority of the thing adjudged to these decrees of this Hon. Court and of the Circuit Court of the United States, which last, following the form of Hennen vs. Gaines, 24 Howard, p. 615, were, (if we remember rightly,) rendered by Mr. Justice Swayne, then sitting in Louisiana as Circuit Judge.

No language which we can adopt will place this proposition of law in so clear a light as what was long since said by this Court in Hopkins vs. Lee, 6 Wheaton. This Court said: "It cannot be denied *that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the parties in the same or any other court.* Hence, a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning *points* thus decided between the parties to such suits."

The two points decided in the decrees pleaded and produced were the main points in controversy in those cases. They were vital questions, and this Court declared its decision in those cases and on those points, as we have seen, final.

No sort of casuistry, we firmly believe, can except this case from the operation of this well settled rule.

See also Aurora City vs. West, 7 Wallace, 82.
Washington Bridge Co. vs Steward, 3 H. 425, 426.
United States vs. Nourse, 9 Peters, 27.
10 Peters, 473.
Goodrich vs. The City, 8 Wallace, 566.

THIRD. The Supreme Court of Louisiana erred in forcing upon the plaintiff in error in virtue of the decree of this Court, the false answers of Chew and Relf. The force of the decree of this court gave Mrs. Gaines the option to use them as *admissions* or not, if the answers were productive of a discovery. 1 Starkie on Evidence, 288.

Phillips vs. Thompson, 1 Johns. Chy, 111.
10 Wal., 436.
Earl Bath vs. Batherson, 5 Leach Mod. R. 9.
2 Cowper, 594.
Roe Ex Dem. Pillet vs. Farrars, 2 Bos. & Pul. 548.
Hoffman vs. Smith, 1 Cain's Rep. 159 and Note 6.
Lawrence vs. Ocean Ins. Co., 11 Johns. 260.

FOURTH. The Supreme Court of Louisiana did not except the status of Mrs. Gaines as legitimate heir of Daniel Clark from the decree. The decree, therefore, affirms the judgment of the lower court, which passed upon the issue of legitimacy made by the petition, and decided that Mrs. Gaines was not the legitimate heir of Daniel Clark, and therefore, that the will was null as to her.

Nothing which is said *arguendo* can lessen the binding force of the decree which responds to the pleadings, and the courts of Louisiana, as well as the courts of the United States, are bound by the decree as rendered.

Respectfully submitted,

E. W. Pace

J. L. A. Fellows

Att'y. for Plff. in Error

United States Supreme Court

OCTOBER TERM, 1875.

MYRA CLARK GAINES,
Plaintiff in Error,

versus

JOSEPH FUENTES ET AL.,
Defendants in Error.

No. 104.

WRIT OF ERROR TO THE SUPREME COURT OF LOUISIANA

Brief on behalf of Plaintiff in Error.

STATEMENT OF THE CASE.

I. The defendants in error, (plaintiffs in the State Court,) asked for judgment "revoking the said pretended will of 1813, (the will of Daniel Clark under which Mrs. Gaines claims title,) and revoking the decree of probate thereof as absolutely void and of no effect in law."

Record, pages 3 and 50.

II. The petition of defendants in error avers, "that the decree of probate (of said will of 1813) was obtained *ex parte*, and by its terms authorized any person, at any time, who might desire to do so, to contest the said will and the probate thereof, and show that no such will was executed, either in a direct action or as a means of defence by way of answer or exception, whenever the said will should be set up as a muniment of title."

That they "are informed that they are unable to contest the validity of the said pretended will of 1813 in the Circuit Court, * * * so long as the said decree of probate remains unrecalled;" said court "declining to allow defendants * * * to contest in said United States courts the validity of said will of 1813, and declaring that the court in which the decree of probate was announced was alone and exclusively competent to question or entertain a suit for the recall and avoidance of the same."

"That the probate of said pretended will of July 13th, 1813, was a gross fraud upon the rights of petitioners;" that it "never existed;" "that the evidence and testimony of witnesses, upon which the same was admitted to probate, was false or erroneous, illegal and insufficient."

That if such a will existed, "it was destroyed or suppressed by said Daniel Clark himself."

That "Daniel Clark was never married and had no legitimate child; that he did not recognize the said

Myra as his legitimate and only child, * * * but on the contrary, he * * * made provision for her as his illegitimate child;" * * * that he did not make and could not have made a will in favor of said Myra, because of her status, she being the issue of an adulterous connection."

Record, pages 2 and 3.

The allegations in the petitions of the intervenors are identical

Record, pages 30 and 31, 32 and 33, 63 and 64.

III. Plaintiff in error applied to remove this case to the Circuit Court on ground of citizenship, (Record, page 4,) with necessary affidavit and bond.

Record, pages 4 and 5

The defendants to the rule to remove the cause, objected—

1st. That the probate court (Second District Court of New Orleans) had "exclusive jurisdiction" over the case.

2d. That the United States courts could "exercise no jurisdiction."

Record, page 6.

The court sustained the objections, and refused to remove, because "the only point in the case" "is to annul the decree of this Court (the court of the first instance) probating, at the instance of the defendant, (the plaintiff in error,) a * * will of Daniel Clark, etc."

"That the court who has rendered a judgment or an order is the only competent tribunal to annul it, when no appeal has been taken from the same."

Record, page 9.

IV. Plaintiff in error again applied to remove the cause, on the ground that she "has reason to and does believe that, from prejudice and local influence, she will not be able to obtain justice." Record, page 12.

The necessary affidavit and bond were filed.

Record, pages 14 and 15.

This application was also refused, on the grounds given for the refusal of the first application.

Record, pages 21 to 23.

The rights under these applications to remove we e reserved. See Bill of Exceptions, Record, page 14, and Exceptions filed, Record, page 24.

V. Exceptions (Record, pages 24 to 26) set up want of jurisdiction, because—

1st. That, in time, petition for removal with bond, was filed under 12th section of the judiciary act of 1789.

2d. That petition, bond and affidavit were filed under act of 1866, for reason of prejudice.

Record, page 24.

7th. That the judgment of this Court in Gaines vs. New Orleans et als. had "the force of the thing adjudged in bar of the right" of this suit, and could not,

being a decree of the courts of the United States, be reviewed by a State court.

Record, page 26.

6 Wall. 718, 719.

24 How. 614..

15 Wall. 624.

VI. Exception was made, "that the allegations charging fraud, error, illegality and insufficiency in the evidence and testimony of witnesses upon which the will of Daniel Clark was admitted to probate, are vague, loose and indefinite, etc."

Record, page 25.

This ground was sustained, so far as to "require the grounds to be stated with sufficient detail, etc."

Record, page 41.

"To set forth specifically the grounds on which they base their allegations that the olographic will probated as made in 1813 by Daniel Clark was a gross fraud; that it never existed; that the testimony of the witnesses was false or erroneous; that he left no will posterior to that of 20th May, 1811; and that he was never married." Five grounds of specification. In other respects, the exceptions were overruled.

Record, page 46.

VII. The supplemental petition, in meeting the requirements of this order to specify—

To the 1st—That the will "was a gross fraud," they

say, "because important testimony and evicence, well known, * * * was withheld and suppressed," etc., and then proceed to specify.

Record, pages 48 and 49.

This allegation is not responsive, nor do the specifications refer to a single item of proof not in the records of Gaines vs. Hennen, Gaines vs. New Orleans, etc., examined and passed on in this Court.

See Notes of Evidence on this and the following grounds, Record, pages 66, 68, 74, 80, 92, 95, 97, 112.

To the 2d, "That it (the will) never existed;" to the 3d. "That the testimony of witnesses was false and erroneous;' and to the 4th. "That he (Clark) left no will posterior to that of 20th May, 1811," they respond by an inferential argument.

Record, page 49.

To the 5th—"That he (Clark) was never married," they set up the marriage of defendant's mother Zulime to Degrange in 1794; that defendant was born during the existence of that marriage; that by his reputation, declaration, letters and conduct, Clark was not married to any one, certainly not to mother of defendant; that if Clark's child, she was an adulterous bastard, etc. The whole being inferential, impudent, argumentative and not responsive to the requirement of the order.

Record, pages 49 and 50.

On prayer for oyer of the documemts, etc., to support their new allegations, (Record, page 55,) answer was made, that they were "to be found in the records

* * * as printed for the use of the Supreme Court of the United States, and used on appeal before said Supreme Court."

Record, pages 58 and 59.

The whole case, then, has been before this Court and repeatedly passed on. The plea of judgment of a Court of the United States, (of *res adjudicata,*) is thus fully sustained by the supplemental answers, and by the answer to the prayer for oyer.

VIII—A plea of prescription was filed (Record, page 64) and interventions of various other parties as plaintiffs. To all these, the same exceptions were taken, the same petitions for removal made, the same rulings given, as to the original and supplemental petitions.

See, Record, *passim.*

IX—An additional "plea of *res adjudicata* as to status," was filed, specifying that because of the introduction of evidence "for the purpose of establishing that Myra Clark Gaines is not the legitimate daughter of Daniel Clark" and that she "is the adulterous bastard child of said Daniel Clark," and to the issue that she "is not the legitimate child and heir of said Daniel Clark," "respondent alleges that said issue of fact and of law has been finally and irrevocably determined and adjudged in her favor by the Supreme Court of the United States in the cases" of Gaines vs. Hennen; Gaines vs. New Orleans; Gaines vs. Delacroix; Gaines

vs. Lizardi, and in the decrees of the Circuit Court in these cases, wherein "Myra Clark Gaines was adjudged and decreed to be the only legitimate child of Daniel Clark," etc.

Record, pages 67 and 68.

It is here again remarked, that this case was tried on the identical testimony found in the records in those cases.

See also agreement, Record, page 106.

X—On these pleadings and others, and the general issue, the case went to trial, was submitted, after argument, on the testimony above referred to, as in the records of cases in the Supreme Court of the United States, and judgment was rendered, ordering that the will "be revoked and declared invalid, and that the probate thereof be annulled, and recalled as absolutely null and of no effect."

Record, page 163.

A new trial was asked for on various grounds, and refused.

Record, pages 163 and 179.

The judgment was appealed to the Supreme Court of Louisiana.

Record, page 185.

Seven assignments of error made.

Record, pages 186 and 187.

And "the judgment of the Court *a qua* affirmed."

Record, pages 188 and 207

All the points made were passed on, and the writ of error sued out. See grounds set forth in petition for writ.

Record, pages 209 to 211.

XI—The questions presented to this Court are:

1st. The right of removal under the 12th section of the judiciary act of 1789.

2d. The right of removal under the act of 1866, by reason of prejudice and local influence.

3d. That the authority of the decree of the Supreme Court in cases of Gaines vs. New Orleans and others, was drawn in question and the force and authority of said decrees were denied by the rulings of the State courts.

4th. That answers of Delacroix and Relf and Chew, in certain bills of discovery, were allowed as testimony to the denial of the force and authority and intention of the Supreme Court of the United States, and especially of that decree which had found the contrary of said answers to be true.

See also Bill of Exceptions, pages 83 and 84.

The same grounds of removal and objections were set up as to the various intervenors, and overruled.

Record, pages 210 and 211.

In the rule for new trial in the lower court. (Record, pages 163 and 167,) and in the assignment of errors in the Supreme Court, (Record pages 186 and 187,) the same grounds were set up with others specially applicable to the State court, and decided adversely to the plaintiff in error. These are specially referred to.

In the case at bar, the heirs-at-law do not appear; the statute of limitations is invoked by the plaintiff in error; the probate of the will of Daniel Clark of 1813 was a proceeding *in rem;* there is no allegation of ignorance, of fraud, or attempt at concealment; the probate was open and public; and, in fact, notorious—who has not heard and known of the Gaines' cases? The defendants in error did not live in seclusion from the means of information; they live in the very city where the probate court and the Supreme Court sat, which probated the will in 1855; indeed, some of them took part in opposing that probate; the ancester of one (Delacroix) brought suit in 1856, to annul the probate in this identical probate court and abandoned his proceedings, and most or all of them were proceeded against in the Circuit Court; several of them have indeed been in this court, in cases where all these issues have been presented and passed upon adversely to them.

But, they say in their petition that the decree of probate, "by its terms, authorized any person, at any time, who might claim so to do, to contest the said will and the probate thereof, and show that no such will was executed, either in a direct action or as a means of defence by way of an answer or exception, whenever said will should be set up as a muniment of title."

This is true; but does the decree limit the action to the probate court, and is not the limit to sue in the probate court confined to heir and legatees? And is not the "any time" limited by the laws of prescription?

The Supreme Court of Louisiana, in a recent case, held, that "it is well settled that a final judgment of a court of competent jurisdiction, as to the status of a person, is *res judicata* as to all the world, and the force and effect of *res judicata*, is 'to make black white, and the crooked straight.'"

Caballero vs. Maduel, 26 La. Ann. 113.

The testament of the late Caballero was [had been] set aside and his daughter * * * decreed to be the legitimate and sole heir of his estate. The suit was to have the universal legatee under that will declared to be interposed for the benefit of a colored concubine of the deceased, and their natural child; to have the executor render an account, and finally to be declared the sole legal heirs of the deceased, and as such to be put in possession of the estate. Page 112.

This case, so far as the authority of the Supreme Court of Louisiana is concerned, is conclusive.

See authority cited. Ennis vs. Smith, 14 How. 430.

But the decree of 1855 probating the will of 1813, did not limit any person to a direct action; any person was allowed to contest the will and the probate thereof, "as a means of defence by way of answer or exception, whenever the said will should be set up as a muniment of title." This was expressly allowed these defendants by Mr. Justice Bradley in the cases in the Circuit Court.

Yet defendants in error in their petition say that the Circuit Court declines to allow them "to contest in said

United States Courts, the validity of said will of 1813, etc.," and this notwithstanding they, or some of them, did raise it in the Hennen case, 24 How. and in the cases of Gaines vs. New Orleans and Gaines vs. Delacroix, 6 Wall., and on the issues of those cases all the testimony this case was offered, went up in the record, and was passed upon by this Court.

II. As to the right of removal on the ground of prejudice and local influence, the Court is again referred to the prior brief in this case and the authorities on pages 24 and 25.

If there ever was a case wherein prejudice and local influence was exhibited, which called for the enforcement of the law of 1866, the one at bar is that case.

The decision of the Supreme Court of Louisiana in this case was rendered in February, 1873, by Chief Justice Ludeling; and yet, the same judge delivered the opinion in the case of Caballero, just cited, in February, 1874. 26 Ann. 112. We make no comment.

The judge of the probate court, Lonis Duvigneaud, proceeded to sit until objections were filed that he had been attorney of record in suits against Mrs. Gaines, when he was forced to recuse himself. Record, pages 5–12–18.

Judge Collins, of the Seventh District Court, in the place of the recused judge, in his reasons for judgment, [Record, page 152,] and for refusing a new trial, [Record, page 179,] holds:

1st. That Mrs. Gaines was an adulterous bastard. Record, pages 152 to 156.

2d. That no marriage took place between Daniel Clark and Zulime Carrière, the mother of Mrs. Gaines. Record, pages 156 to 159.

3d. That he believes, with Judge Lea, who, as judge of the probate court, refused to probate the will of 1813 on some technical objection, that "there is no doubt that Clark did execute a will shortly before his death," and that "Clark himself died believing it was in existence," and "on the whole, it was well sustained by the evidence as it now stands." Record, page 159.

4th. "That the will probated [that of 1813] should not remain so, for it contains such an acknowledgment, [that is, that Myra was Clark's only legitimate daughter and heir,] and would not therefore be a true version," and therefore, "Clark could not and did not make the probated will." Record, pages 159 to 162.

5th. That "the prescription of five years does not apply to cure an absolute nullity, such as results from a violation of public policy and prohibitive law."

Record, page 162.

Therefore, the probate of the will was revoked.

Record, pages 163 and 179 to 184

This judge was to try the questions of fraud; the non-existence of the will; the falsity and error of the testimony for its probate; the fact that Clark was never married. Record, page 46.

He did not decide there was fraud in the will; he did decide that Clark left a will; and then deciding that the Supreme Court of the United States, on three

several occasions, on the same testimony which he had before him, proceeded to pass upon the status of the defendant, and on that conclusion as to status, decided, not that the witnesses had sworn falsely, but that, by reason of the status as determined by him, and which he had no right to determine, Clark could not have made any such will, and therefore the witnesses must have been mistaken as to its contents; and this in direct contradiction to his first position.

We pass over the reasoning in support of the decision of the Supreme Court of Louisiana without further comment than to say, that it does not agree with that of the judge *a quo*, but bases the ruling on the technical one of the requisites of proving a lost will; and this in the case of the very will which his predecessors had probated in 1855, in spite of the very same technical objections,

Succession of Clark, 11 Ann 112,

and which ruling as to *res judicata*, the same Court, through the same judge, has since ruled differently.

Caballero vs. Maduel, 26 Ann. 112.

III. As to the force of the thing adjudged by courts of the United States, and their binding effect upon the courts of the several States, both as it regards the admission of the testimony of Delacroix and Chew and Relf, and to the status of the plaintiff in error, reference is made to the last page of the original brief, and to the authorities there cited.

These questions are not grounds for *the removal* of the cause, but are such as are subject to review by this Court on writ of error to the State courts. Nothing is better settled, than that this Court can protect its own decisions when disregarded by the State courts.

Dupasseur vs. Rochereau, 21 Wall. 130.

IV. Though this Court can, and we submit should, reverse the decision of the State court, and remand the case, with directions that it be removed to the Circuit Court of the United States for trial; or decree that the contest of the will and its probate might be set up as answer or exception to the claims of the plaintiff in error in her suits in the Circuit Court, wherein she set up that will as a muniment of title; yet, as the Court has in this record the entire testimony in the case, and the same testimony upon which it has already passed, it can, and we respectfully submit should, under the third and fourth grounds, and the novel circumstances presented, pass upon the whole merits of the controversy, and once more make an end of "a litigation of thirty [now forty-four] years," and cause the case again to be "finally settled," and give Mrs. Gaines the assurance that her rights in the estate of her father "will *now* be recognized."

Respectfully submitted.

J. Q. A. FELLOWS.

United States Supreme Court.

October Term, 1875.

MYRA CLARK GAINES,
Plaintiff in Error,
vs.
JOSEPH FUENTES *et al.*,
Defendants in Error.

No. 104.

Error to the Supreme Court of Louisiana.

Brief for Defendants in Error.

In this case, at a prior term of court, a motion was made to dismiss this writ of error for want of jurisdiction, and the motion was denied.

Since that time the case of Broderick's will has been decided, a report of which will be found in 21 Wallace Rep., page 503.

We ask leave to add this case to the other authorities quoted in our brief on the motion to dismiss, and to make that brief a portion of our argument now.

Although Mrs. Gaines' case has been many times before this honorable court, it has never hitherto presented itself in its present aspect, and none of the previously reported cases in which she was a party involves the solution of the same legal principles, except the case of Gaines *vs.* Chew &

Relf, (2 Howard, 619,) which was quoted and approved in the Broderick will case in 21 Wallace, 503, above referred to, in support of the doctrine we rely on for a dismissal of this case for want of jurisdiction, *ratione materiæ*.

We assume that the history of this case is well known to your Honors. It is set out in Gaines *vs.* New Orleans, (6 Wallace, 642, December Term, 1867;) and it is understood that, as far as that account goes, it had the sanction of the respective counsel of the parties at that time.

When the case of Gaines *vs.* Relf *et al.* (12 Howard, 472, December Term, 1851,) was decided there seemed to be an end to the litigation connected with Daniel Clark's estate. Every material point had been decided against Mrs. Gaines.

How came new life and energy to be infused into the case?

This result was brought about by the decision of the supreme court of Louisiana in February, 1856, in the matter of the succession of Daniel Clark, reported 11 Louisiana Annual Rep., page 124.

Up to the time of this decision, the probate court of the parish of Orleans had admitted to probate but one will of Daniel Clark; and this will was dated May 20, 1811.

Under this will, and under Daniel Clark's mother and forced heir, the defendants in error claim. But now, by a decree of the supreme court of Louisiana, reversing the judgment of the probate court of Orleans refusing to probate it, a second will of Daniel Clark, dated July 13, 1813, is ordered to be probated. The decretal part of the opinion reads as follows:

"It is therefore ordered, adjudged, and decreed by the "court, that the judgment of the lower court be avoided

" and reversed; and proceeding to render such judgment " as should have been rendered in the lower court, it is " ordered, adjudged, and decreed that the will of Daniel " Clark dated New Orleans, July 13, 1813, as set forth in " plaintiff's petition, be recognized as his last will and " testament, and the same is ordered to be recorded and " executed as such, and it is further ordered that François " Dusan de la Croix be confirmed as testamentary execu- " tor of said last will and testament, and that letters tes- " tamentary issue to the said De la Croix, and that the " costs of this proceeding be borne by the succession."

Ib., p. 131.

But Richard Relf (the survivor of Chew & Relf) was inadvertently a party to this record; and in a rehearing, the supreme court of Louisiana adds:

" Without indicating what modes of defence parties may " adopt, we think the judgment in this case should not " conclude Richard Relf, but that he, as well as those not " parties to the suit, should be allowed to oppose to the will, " when set up against them, whatever defences the law per- " mits in like cases."

And farther:

" We are referred to an expression in the opinion read, " wherein we say that the decree which we make [admit- " ting the will to probate] does not exclude any one who " may desire to contest the will with the appellant [Mrs. " Gaines] IN A DIRECT ACTION, and to show that no such " will was executed. This must not be understood as ex- " pressing the opinion that other means of defence might " not be used, *as by way of answer or exception*, whenever " the will is set up as a muniment of title."

The consequence of this latter modification of the judgment was a vast amount of litigation by the claimants under the first will, who, for a long time, labored under a strong conviction that inasmuch as this decree, as finally moulded, virtually reserved to them the right of relying on their possession and title, and interposing both as a shield against Mrs. Gaines' claim under the will of July 13, 1813, they delayed the institution of "THE DIRECT "ACTION" suggested by the supreme court of Louisiana in the decision just quoted until May 27, 1869.

Record, page 1.

This was shortly after the decree was rendered in Gaines *vs.* New Orleans, (6 Wallace, 642.) In the face of this latter decree, all attempts at defence on the basis of title and possession under the first will of Daniel Clark were found to be untenable so long as the will of July 13, 1813, continued probated and unrecalled. Indeed, a direct remonstrance was addressed to the claimants by your Honors, in which the proper line of proceeding on their part was clearly indicated.

"But why, if the will is invalid, has the probate of it "rested for twelve years unrecalled, when express liberty "was given by the supreme court of Louisiana for any one "to contest it IN A DIRECT ACTION with complainant? If, "with this clear indication of the proper course to be pur-"sued, the probate of the [last] will still remains unre-"voked, the reasonable conclusion is the will itself could "not be successfully attacked. Be this as it may, while "unrevoked it is the law of this case, and so this court "held in Gaines *vs.* Hennen."

This, then, is that "DIRECT ACTION" pointed out originally by the supreme court of Louisiana in February, 1856,

when that court, in the exercise of its appellate jurisdiction, ordered Daniel Clark's will, of July 13, 1813, to be recognized as his last will, and directed it to be executed and recorded. This will was not produced. Its proof was exclusively *ex parte;* no one, not even Richard Relf himself, the original head and front of the case, being allowed to take any part in the proceedings; and the decree of probate was made more than forty-two years after the date of the will and the death of Daniel Clark. The reason for this proceeding is, to our minds, very plain. Mrs. Gaines, in the vast litigation prior to this probate, had encountered a fatal impediment—the total absence of jurisdiction in the Supreme Court of the United States "to avoid a will, or to "set aside the probate thereof on the ground of fraud, "mistake, or forgery, this being within the exclusive juris- "diction of the courts of probate."

Broderick's Will Case, 21 Wall., 503, relying on Mrs. Gaines *vs.* Chew & Relf, 2 Howard, 619.

And the concluding motive of the supreme court of Louisiana for ordering the probate is: "The plaintiff pre- "sents to us a *prima facie* case, which entitled her to re- "lief. The decision which we make does not conclude "any one who may desire to contest the will with her "[Mrs. Gaines] IN A DIRECT ACTION, and to show that no "such will was executed. *On the other hand, a refusal "to probate the will places it beyond the power of the "applicant to set up her rights under the will against "any other person.*"

This, it seems to us, is equivalent to saying: "On ac- "count of the want of judicial power in the United States "court, which has heretofore prevented Mrs. Gaines from "having her rights under the alleged will of Daniel Clark

" judicially determined, we, for the ends of justice, now " order the alleged will to be probated *ex parte*, to enable " her to set up her rights under it against the whole " world." Had it not been for this judgment the litigation would probably have ended then and there, on the promulgation of the decree in 12 Howard, 472, [1852.]

But this anomalous decision of the highest court in Louisiana, had it remained without its amendment, and without the suggestion that all interested might, " *either* " *by answer or exception*," contest the will, would have failed to produce the litigation ensuing thereon. Unfortunately for those interested in the first will, though defendants in the United States circuit court for the District of Louisiana, and there successfully defending themselves *by answer and exception* against Mrs. Gaines, yet the decree of that court was reversed by your Honors, and mainly for the very reason and motives attributed by us to the judgment of the supreme court of Louisiana in acknowledging the last will: the want of judicial power in the National courts to probate or recall the probate of Daniel Clark's will.

From this statement it is plain that if any one point has received a legal and proper determination in this case, it certainly is that the judicial power of the United States does not extend to the probate of a will, or to its recall when probated.

We think, therefore, for these and other reasons set forth in our motion and brief to dismiss, that your Honors have no jurisdiction over this case, *ratione materiæ*.

It might not be unwise to add that the judgment of the supreme court of Louisiana, enabling Mrs. Gaines " to set " up her rights under the will against any other person,"

was an incident to their appellate jurisdiction. It was, as we understand it, precisely similar to the action of the judicial committee of the Privy Council on appeal from the decree of an ecclesiastical court, and the act of bringing this suit by writ of error to this honorable court under Revised Statutes, Article 709, operates exactly like a review, IN CHANCERY, of the decree of a *probate* court in a matter purely of *probate* jurisdiction.

See Lord Brougham in Allen *vs.* McPherson, 1 H. L. C., *224.

Over forty-two years elapsed from the death of Daniel Clark to the probate of the will of 1813. And since that probate, which was in February, 1856, the defendants in error here, the plaintiffs in the court below, have been vainly trying to use their right reserved to them by the supreme court of Louisiana to contest the will of Daniel Clark, "*by way of answer or exception, whenever the will* "*is set up as a muniment of title.*" But this could only be done, *if at all*, in the courts of Louisiana, as the quoted cases in 11th Louisiana Annual Rep., p. 133, show.

Kilgore *vs.* Ratliff's heirs, 2 New Series, (Martin,) 301.
O'Donogan *vs.* Knox, 11 Louisiana R., 388.
Robert *vs.* Allier, 17 *Ibid*, 13.

The true doctrine is expressly recognized in the last case quoted of Robert *vs.* Allier, (17 La. Rep., 13:) "Whenever "the validity or legality of a will is attacked and put at "issue, [as in the present case,] at the time that an order "for its execution is applied for, or after it has been regu- "ularly probated and ordered to be executed, *but previous* "*to the heirs or legatees coming into possession of the es-* "*tate under it*, courts of probate alone have jurisdiction to "declare it void, or to say that it shall not be executed."

We consider it, therefore, beyond all doubt, that in this case, "*as answer or exception*," the nullity of the will of 1813 could not be relied on as a defence, even in the courts of Louisiana. Mrs. Gaines has never been *put into possession* of Daniel Clark's succession, but all her litigation has been directed to attain that very end. (La. Code 1870, articles 976 *et. seq.*, 1012–1193; C. Practice, 1,000–1,003.) And the whole line of decisions in the National courts is radically opposed to any such indirect mode of procedure. These tribunals have emphatically pronounced their inability to recall the probate of Daniel Clark's will of 1813, for want of jurisdiction *ratione materiæ*. The natural and most obvious procedure was to contest the will IN A DIRECT ACTION; and that this was the correct path to take is evident from another consideration.

The will of 1813 was probated as the will of Daniel Clark, the father of Myra Clark Gaines; by the will he recognized her as his legitimate and only daughter, and constituted her his universal legatee.

It is thus seen that the *ex-parte* probate of the will of 1813 fixed by the judgment of the court, at least *prima facie*, the *status* of Mrs. Gaines as *the sole legitimate child of Daniel Clark.*

By Louisiana law, the mother of Daniel Clark would have been *his forced heir*, had he died without children. (Article 1494, Civil Code 1870.) "Donations *inter vivos or* "*mortis causa* cannot exceed two-thirds of the property, "if the disposer, having no children, leave a father, mother, "or both."

The allegation of the petition is, (Rec., p. 3,) "that the "said Daniel Clark left no will whatever posterior to that "dated May 20, 1811, which was probated as above stated "in this court August 17th, 1813, and by which Mrs. Mary

" Clark, who was his mother, and his sole and legal heir, " was instituted his universal legatee, and which probate " and will remained in force nearly half a century as the " basis of title to the property of his succession."

This probated will is on Rec., p. 109. Its genuineness has never been contested. Mrs. Gaines was born in 1804 or 1805 or 1806. She must have been at least five years old when the will was penned by Daniel Clark.

Again, by Louisiana Code, article 1493, " Donations " *inter vivos or mortis causa* cannot exceed two-thirds of " the property of the disposer, if he leaves, at his decease, " a legitimate child; one half, if he leaves two children; and one-third if he leaves three or a greater number."

Under this provision Mrs. Gaines claims to be not only the sole forced heir of Daniel Clark, but to exclude Daniel Clark's mother from all share in his estate. This would undoubtedly be the result if the will of 1813 remained in operation.

But another article of Louisiana Code provides: " Natural " fathers and mothers can in no case dispose of property in " favor of their adulterine or incestuous children, unless to " the mere amount of what is necessary to their 'susten- " ance, or to procure them an occupation or profession by " which to support themselves."

Art. 1488.

And based on this law are the allegations in the petition just quoted from; (*a*,) that Daniel Clark was never married, and had no legitimate child; (*b*,) that he made provision for Myra by secret trusts as his illegitimate child; (*c*,) and that " she, being the issue of an adulterous connec- " tion, was without the legal capacity of inheriting or re- " ceiving by last will from Clark."

It is very plain, therefore, that, even if Daniel Clark had made the will of 1813, Mrs. Gaines could not take any bequest under it, had she been proved an adulterous child, under L. C., 1488, above cited.

Our position is not only that the jurisdiction of the National courts does not, and cannot, extend to the probate or recall of the probate of a will, but that *á fortiori*, the *status* of a forced heir, when once determined by a probate court, is exclusively a matter of probate jurisdiction, over which your Honors can have no control and no right to any kind of supervision. The high court of chancery in England declines to reverse the judgments of an ecclesiastical court collaterally. A scientific administration of public justice exacts even more rigorously in this Republic a strict adherence to this principle. The administration of estates being a proceeding *in rem*, and a succession being a strict *universitas*, all the world are parties, and concluded by the proceedings. It would be anomalous and absurd to have the decrees of State courts of exclusively probate jurisdiction pronouncing children legitimate or illegitimate, or even adulterous or incestuous, reversed collaterally by circuit courts of the United States. Still more inexpedient would it be in your Honors obtaining jurisdiction over the parties by means of that vast "conduit-pipe of litigation," (Revised Statutes, No. 709,) to reverse on appeal the decrees of probate courts on matters thus pertaining exclusively to successions and estates. The simple reason is that the courts of Louisiana cannot collaterally do these things. And no greater delusion could exist than to suppose that the National courts can and do give greater relief to a suitor than the courts of the State within the limits of which the suit is brought.

It now appears that this suit involves two distinct issues,

both exclusively within the long established sphere of a probate court: *First*, Did Daniel Clark make the will of 1813? If he did not, there is an end to the case. But if he did, then, *Second*, Was Mrs. Gaines his illegitimate and adulterous child?

See Code of Practice of Louisiana, Article 924.

"The extent of the testamentary disposition," as well as "the portion of her estate which the testatrix could legally "dispose of," are questions "exclusively within the juris- "diction of the court of probates."

Robert *vs.* Allier, 17 La. Rep., p. 16.

In the light of these principles and authorities, which harmonize perfectly with the legal views of the Supreme Court of the United States, as expressed in their opinions for many years past, this writ of error should be dismissed.

Nor can it be successfully urged that the rule to transfer the case from the probate court of New Orleans to the United States circuit court for Louisiana presents a Federal question which gives this court jurisdiction under article 709, Revised Statutes. This point is made in our motion to dismiss, and briefly disposed of.

It is quite irregular to rest the appellate jurisdiction of your Honors upon this rule to remove this case to the Federal court, because it appears from the record that after the probate judge had refused the transfer to the Federal court, Mrs. Gaines applied to the judge of the same Federal court for a peremptory mandamus on the probate judge trying this case, "requiring him to allow the defendant, Myra "Clark Gaines, to remove and transfer to the next term of "this [U. S. circuit] court the suit commenced by Joseph

" Fuentes and others against him [her] in said second dis-
" trict court of the parish of New Orleans."

Record, page 43.

This rule was dismissed by the Federal court. The judgment of dismissal refused and denied to Mrs. Gaines the writ of mandamus she had applied for, and was a final judgment, working an irreparable injury. The reasons for judgment are set forth in the record *loco citato*. They may be included in a single principle of law: the Federal courts have no jurisdiction *ratione materiæ* over the probate or the recall of the probate of a will; which, it will be noticed, is the exact doctrine which we have endeavored to demonstrate herein.

By what disorderly procedure are you then called upon to revise and correct a judgment of a circuit court of the United States by means of a writ of error to the supreme court of a State? How comes it that, by means of article 709, Revised Statutes, your Honors are not only revising the judgment of "the highest court of a State," but at the very same time, and in the very same suit, exercising your appellate jurisdiction, and affirming, reversing, or revising and reviewing the final judgment of a United States circuit court?

We freely admit that over this question of removal your Honors would have undoubted jurisdiction, had it come before you regularly, on this writ of error. But Mrs. Gaines, having had her recourse to the Federal tribunals for a mandamus, those tribunals being every way competent to entertain and finally determine such cases, and having acquiesced in the decision, she cannot now turn round and complain of the very same decree, upon the very same cause of action, between the very same persons and

privies, made by the State courts. Her remedy was to take a writ of error to revise the judgment of the United States circuit court refusing her the mandamus applied for. *Electâ unâ viâ, non datur recursus ad alteram.*

United States *vs.* Boutwell, 17 Wall., 604.
Heine *vs.* Levee Commissioners, 19 Wall., 655.
Also, Tapping on Mandamus, * 8.

"In every case in which judgment is given either party "is at liberty to prosecute a writ of error thereon, accord- "ing to the ordinary course of a writ of error in personal "actions."

See, also, Columbian Insurance Co. *vs.* Wheelwright, 7 Wheat., 534.
2 Cranch Ct. Ct., 272.

Nor is this point "mere mouse-trap matter." It is both radical and visceral. It involves principles of the greatest importance, and of universal applicability. *Res judicata pro veritate accipitur.* It is an exception *juris et de jure.* It is A TRUTH. *Interest rei publicæ ut sit finis litium.* "It is for the public good that there should be AN END to litigation."

But, if these legal principles were ignored, what injustice, under the forms of law, would it be to the judges of original jurisdiction! In the first place, to reverse collaterally, and by a disorderly procedure, the solemn judgment of the judge of a United States circuit court, and in the second place, inviting the judge of the State court to exercise his judicial power by decreeing it lawfully vested in him, only to reverse his judgment on writ of error by declaring him incompetent to try the case!

We freely admit that when there is a doubt upon the

question of *res judicata*, the party against whom the plea is set up should have the benefit of that doubt. But your Honors must ignore all the proceedings in the mandamus case before the U. S. circuit court, or be bound by its decree, because, in point of fact, Mrs. Gaines' application for the mandamus in the circuit court, U. S., was made before there was any *contestatio litis* in the probate court. All the proceedings in this latter court have taken place, so far as the merits of the case are concerned, after the judgment denying the mandamus; and they have been reared upon this very judgment of the circuit judge. The hypothesis that the State judge would have proceeded to try the case *after* Mrs. Gaines had applied to the Federal court for a mandamus to remove the cause, and before the Federal judge had passed upon the matter, is entirely inadmissible. Such a folly as that would be we never knew any Louisiana judge to commit; but in the case of the learned and every way excellent and upright jurist who presided over the trial of this case in the probate court, in the place of the regular judge who was recused by Mrs. Gaines, this hypothesis would be quite unreasonable. This part of the case falls even within the narrow rule laid down in—

Packet Company *vs.* Sickles, 5 Wall., 592.

Forms of action are entirely immaterial in the decision of the exception of *res judicata*. "It matters not under "what form, whether by petition, exception, rule, or inter- "vention, the question be presented; whenever the same "question recurs between the same parties, even under a "different form of procedure, the exception of *res judicata* "estops. *Exceptio rei judicatæ obstat, quoties inter* "*easdem personas eadem questio revocatur vel alio genere* "*judicii.*"

Trescott *vs.* Lewis, 12 A., 197.

The civil law authorities are innumerable on this point; and *ex necessitate rei*, the doctrine must belong to every system of jurisprudence as one of its essential elements. Give this exception of *res judicata* another name, and call it an "*estoppel by an adjudication of a matter in a court* "*of competent jurisdiction*," and you will find the same subject-matter governed by the same principles.

Bigelow's Estoppel, page 9.

This author, in his voluminous work, affirms the doctrine that the form of action is immaterial when the same subject-matter has been adjudicated.

Ibid, p. 126.

The same doctrine is seen slowly dispersing the thick mists of uncertainty and error in—

Stevens *vs.* Hughes, 31 Penna., 381.
See also Browne's Maxims, *253, and Note 1 on same page.

The true doctrine is sustained and enforced in—

Beloit *vs.* Morgan, 7 Wall., 623.

It is quite clear, then, when the United States circuit court decided that over the subject-matter of this suit the Federal courts had no jurisdiction, and denied her the mandamus she applied for, Mrs. Gaines should have taken her writ of error and applied to your Honors, then and there, for redress. It is now too late. "The funeral has "passed by; the dead cannot be resuscitated." She cannot attack that judgment collaterally. "She has slipped "her time."

See City of Lafayette *vs.* Parish Judge, 8 Rob., 5.
State *vs.* Judge Morgan, 12 Louisiana, 118.

See, also, on the Remedy by Mandamus—

Hatch *vs.* Chicago Railroad, 6 Blatch., 105.
Fisk *vs.* Union Pacific R.R., 6 Blatch., 362.

But should your Honors be of a different opinion upon the legal principles advocated, and conclude that this judgment of a probate court, recalling the probate of a will duly confirmed by the supreme court of Louisiana, was actually within your appellate jurisdiction conferred by the National Constitution, and could be properly and legally exercised in this case under article 709 of the Revised Statutes, then we submit that on the merits the judgment appealed from is correct, and should be affirmed. Nor shall we extend the brief by an enumeration of the matters of fact upon which the lower courts proceeded. It is not necessary, nor would it be useful, because they are already "familiar as household words" to your Honors, and form a large and material portion of the history and traditions of the court. We have been struck, however, whilst examining the case, with the reasons for judgment filed in the probate court by the able jurist unexpectedly called upon to preside on the trial, and which are spread over the Record, on pp. 152 *et seq.* Also, to his opinion refusing a new trial, on Rec., p. 179. To these may be added the opinion of the supreme court of Louisiana affirming his judgment, on page 189 *et seq.* of the Record.

We pray your Honors to dismiss this case for want of jurisdiction, or to affirm the judgment of the lower court, with costs and general relief.

JAMES McCONNELL,
DURANT & HORNOR,
Att'ys for Defts. in Error.

WASHINGTON, D. C., *December* 10, 1875.

United States Supreme Court.

MYRA CLARK GAINES, Plaintiff in Error,
vs.
JOSEPH FUENTES *et al.*
No. 104.

Brief in Reply of Counsel of Defendants in Error.

The counsel of plaintiff in error have made in their brief five assignments of error, which we will proceed to review as fully as the time allowed us will permit.

Their first assignment of error is found p. 12 of their brief. It involves almost, if not everything, which is material to any legitimate discussion in this court of the case presented on the Record; that is to say, did the supreme court of Louisiana err in affirming the decision of the probate court in New Orleans refusing the prayer of the plaintiff in error to have this matter transferred to the circuit court of the United States?

This question has already been discussed by us at some length, in our former briefs.

See our brief on motion to dismiss at October term, 1874, pages 5 to 9.

See our brief filed October term, 1875, page 8, *et seq*.

We beg leave to add some farther considerations.

A. In Louisiana, any person who may feel an interest in having a will probated may present a petition for that purpose to the judge of the court of probates.

La. Code of Practice, art. 928.

B. And in the case at bar the probate of 1856 was not binding on anybody.

See the decision of the supreme court of Louisiana in the matter of the succession of Clark, 11 Louisiana Annual, pp. 131 and 134–'5, on rehearing.

C. The proceeding now drawn in question to recall the probate of the supposed will of 1813 was not such a matter as could be transferred, since it was merely ancillary to the original proceeding had by plaintiff in error to probate the same will of 1813. Similar in many respects to a bill of review in chancery, (see Daniels' Chancery Practice, pp. 1724 *et seq.*,) it was not an independent and separate litigation. The second proceeding could not have arisen had not plaintiff in error probated a supposed will of 1813 in 1856, and it was only incidental to that first proceeding. It comes completely within the principle laid down by the court in Bank *vs.* Trumbull.

See 16 Wallace, page 195, and the authorities cited at foot of said page.

If, therefore, this matter could otherwise and from its nature have been entertained by a circuit court of the United States, yet in this particular instance the proceedings could not have been transferred to such a court, as it

was only an auxiliary and not an original proceeding; it is not one of the "suits" embraced in the meaning of the act of Congress of March 2, 1867.

14 Statutes, pp. 558 and 559.

The proceeding in a court of probate to register a will, or to revoke the registry thereof, is not a "suit" in the proper meaning of that word. There is nothing demanded from any one; no relief required against any one; no one is condemned to pay or to do anything. The will being proved, is ordered to be spread, registered, upon the books of the court, and the court being the exclusive guardian of its own books and records, has always the power to make them accord with the truth, to purge them from error; and with this function no other court has the right to interfere.

In this succession of Clark, a will was probated in 1813.

In 1834 the plaintiff in error instituted proceedings to set aside that probate, which proceedings were dismissed.

In 1855 plaintiff in error instituted proceedings to probate another will, that of 1813. They were purely *ex parte*, and one of the executors of the former will of Daniel Clark, and the city of New Orleans, who desired then to oppose the proceedings, were not allowed to do so.

See 11th Louisiana Annual, pp. 134–5.

And see, also, pages 6 and 7 of the record filed in this court December 19, 1865, and styled, "Probate record in the case of Gaines *vs.* Lizardi *et al.*, Gaines *vs.* City of New Orleans *et al.*, and Gaines *vs.* Delacroix *et al.*; appeals from the circuit court of the United States for the eastern district of Louisiana."

The probate of the supposed will of 1813, in 1856, set aside by implication the probate of the will of 1811, in 1813, after a lapse of more than thirty years, and the power of the probate court to do so is not questioned.

So the act of the court in recalling that probate of 1856, in 1871, is a power equally clear.

The attempt was made in the State courts to invoke the laws of Louisiana with regard to the prescription of suits against the proceeding of defendants in error to revoke the probate of 1856, on the ground that the action was barred by lapse of time, but this pretension was repelled by the Louisiana tribunals for the reason that such a proceeding and order is not, under the law of Louisiana, a suit, action, or judgment, but only an order of court, which, from its nature, remains always under the control of the court which granted it.

We respectfully invite the attention of this honorable court to the portion of the opinion of his honor Judge Collins, of the probate court, at pages 22 and 23 of this record, and also to the views of a similar character expressed in the admirable and learned opinion of the supreme court of Louisiana at page 199 of this record.

It is very plain, then, that this revocatory order now before you was one given in the course of the proceedings of a succession, *i. e.*, the estate of Daniel Clark, opened in 1813, and is by the law of Louisiana, as well as by the nature of the thing, not a suit, and therefore not a matter transferable, under the act of Congress of 1867, to the courts of the United States.

It may be convenient here to give, merely as a matter for reference, and to guide the eye in running along the course of these proceedings, a chronological statement of the principal steps which have been taken in connection with the proceedings in regard to these two wills.

1813, Aug. 16, Daniel Clark died in the city of New Orleans.

1813, Aug. 17, Clark's succession was opened in the probate court of that city as No. 8646, and on the same day the will, dated May 20, 1811, was probated and ordered to be executed. This will was in favor of Clark's mother, who was then living, and was his forced heir.

1834, June 18, Suit brought in the probate court of New Orleans by Mrs. Gaines, (then wife of W. W. Whitney,) declaring that Daniel Clark had left a second will dated in 1813, and demanding that the order probating the will of 1811 be revoked, and that she be put in possession of Clark's estate.

1836, June 8, Judgment was rendered in the probate court dismissing this suit of Mrs. Gaines, then Mrs. Whitney, as in case of non-suit, because of (as is said in the judgment) "the "plaintiffs declining and refusing to pro- "ceed with their claim."

1836, Aug. 16, Bill in equity filed in U. S. circuit court in Louisiana in which Mrs. Gaines claimed the estate of Clark, both as instituted heir under the will of 1813 and as heir-at-law.

1844, January, Supreme Court of U. S. maintained a demurrer to the bill deciding—1. That the

will must be probated before a claim could be set up under it. 2. Maintaining the bill as one of discovery so far as to compel Relf & Chew, the executors of the will of 1811, to answer in order that "their answers being obtained may be "used as evidence before the probate "court to establish the will of 1813 and "revoke that of 1811." (See 2 Howard, p. 646.)

1848, Nov. 28, Amended bill filed by Mrs. Gaines, in which the claim under the will of 1813 was renounced, but the fact insisted on that a will was made, to aid in her claim as heir-at-law. (See Record of 1851, vol. VI, p. 85.)

1851, D'c. term, Supreme Court of U. S. decided case reported in 12 Howard, p. 472. This decision was adverse to Mrs. Gaines. The court then held, among other points decided, as follows: "The first and most "important of the issues presented is "that of the legitimacy of the complain-"ant." (12 Howard, p. 506.) And among other *conclusions* was the following: "Therefore the complainant is not "the lawful heir of Daniel Clark, and "can inherit nothing from him." (12 Howard, page 539.)

1855, Jan. 18, A petition was filed in the matter of the succession of Clark, No. 8646, by Mrs. Gaines, *ex parte*, praying for an order of

probate of a will of Clark alleged to have been made in 1813.

1856, Feb., The order of probate prayed for was granted by the supreme court of Louisiana. (See suc. of Clark, 11 An., p. 134.)

1857, Suits Nos. 2695, 2734, and 2619 were brought in the U. S. circuit court for Louisiana, in which the will of 1813, so probated, was set up as the muniment and source of title.

1858, Judgment was rendered in the circuit court in favor of the defendants in all these suits.

1868, On appeal, the U. S. Supreme Court reversed the decrees of the circuit court, and held that the will could not be attacked in the U. S. courts. (6 Wallace, 642; *Ib.*, 719.)

1869, May 27, Petition filed by Jos. Fuentes *et al.* in the probate court to revoke the order of probate granted in 1856.

1871, Dec. 4, Judgment of probate court rendered revoking the order of probate.

1873, Feb. 24, This judgment affirmed by the supreme court of Louisiana.

1873, Mch. 31, Writ of error allowed.

D. The counsel of plaintiff in error are entirely wrong in saying, (see their brief, p. 16:) "It is well settled that "Fuentes and others had the right to bring the action in

" the courts of ordinary jurisdiction, if it had pleased them " to do so."

The law and authorities were the other way.

The question has been ably argued by the learned judges of the courts of Louisiana in this very case.

See the opinions of Collins, J., Rec., p. 9, fols. 25 and 26, and Rec., pp. 38 and 39, and cases cited.

See the opinion of Sup. Ct. La., Rec., p. 192, fol. 693, and cases cited.

See also the case of Robert *vs.* Allier, 17 Louis. Rep., p. 13, quoted on our brief at this term, pp. 7 and 8.

We have looked at all the cases quoted on brief of plaintiff in error, (p. 16,) and not one of them sustains their position.

There was no possibility of taking the question of the probate of Clark's will out of the probate court of New Orleans, where plaintiff in error, quite properly, originally placed it. It could not have been transferred from the probate to a court of ordinary jurisdiction. Hence the inference drawn on page 17 of brief of plaintiff in error is inconsequential, and the case cited of Bushnell *vs.* Kennedy (9 Wallace, 393) has no applicability. That was a case where the question of citizenship solely was involved; the matter of the suit was not drawn at all in question.

E. By the *second section of the third article* of the Constitution U. S. "The judicial power shall extend to" * " controversies between" * "citizens of different States."

The word controversies is here evidently used in the sense of suits; but does this mean all controversies?

If not, what are the exceptions?

To give jurisdiction to a court of the United States, the Constitution and the law of Congress must both concur.

Now the eleventh section of the judiciary act of 28th September, 1789, says: "That the circuit courts shall have "original cognizance, concurrent with the courts of the "several States, of all suits of a *civil* nature at *common* "*law or in equity*, where the matter in dispute exceeds, "exclusive of costs, the sum or value of $500, and the "United States are plaintiffs or petitioners, or the suit is "between a citizen of a State where the suit is brought "and a citizen of another State."

"No suit can be removed to the national courts which "might not by the Constitution of the United States have "been originally commenced in one of these courts," &c., &c.

Conkling's Treatise, edition Albany, 1856, page 177.
See Smith *vs.* Rines, 2 Sumner C. C. Reps., p. 345.
See Beardsley *vs.* Torrey, 4 Wash. C. C. Rep., p. 288.

"Rogers *vs.* Rogers, (1 Paige's Chan. Rep., p. 183,) where "it was held 'Congress never intended to authorize the de- "fendant to remove any suit or proceeding before a State "court, unless the circuit court of the United States had "jurisdiction of the subject-matter of such suit, and had "the power to do substantial justice between the parties.'"

"Tibbatts *vs.* Berry, &c., (10 B. Munroe, Ky. Rep., p. "490,) Marshall, C. J., held: 'The 12th section of the act "of Congress of 1789, to establish judicial courts of the "United States, *does not*, in our opinion, *authorize the re-* "*moval of a suit* in its progress from the inferior to the "superior or appellate tribunals of a State, and we think "*it has no application to this proceeding for the probate* "*of a will.*'"

In order, therefore, that a suit may be transferred from

a State to a National court, whether on the application of plaintiff or defendant, the following circumstances must exist:

1. It must be a suit of a civil nature.

2. It must be a suit at common law.

3. Or a suit in equity.

4. The matter in dispute must exceed $500.

5. It must be between a citizen of the State where the suit is brought and a citizen of another State.

The expressions of the act just quoted refer to the systems of law prevailing in the country from which the colonies mainly derived their origin; but in the kingdom of England there were several laws.

Goold, J., Regina *vs.* Paty *et alios*, 2 Lord Raymond, p. 1106. Edition, London, 1765.

"Lex terræ is not confined to the common law, but takes "in all the other laws which are in force in this realm, as "the civil and canon law," &c.

Same.
Powys, J., same case, p. 1108.

Probate proceedings were not matters either of common law or equity, but of the canon or ecclesiastical law.

"The executor must prove the will of the deceased, which "is done either in common form, which is only upon his "own oath before the ordinary or his surrogate." * *

" When the will is proved the original must be deposited " in the registry of the ordinary."

Blackstone's Commentaries, Book II, p. 508.

" The prerogative court is established for the trial of all " testamentary causes where the deceased has left *bona* " *notabilia* in two different dioceses. In which case the " probate of the wills belongs to the archbishop of the " province, by way of special prerogative," &c.

Same, Book III, pp. 65, 66.

It follows, therefore, that the proceedings now brought before you were not a suit or controversy at common law or in equity, and hence could not be of the jurisdiction of the United States courts; and these questions, as well as all those we have enumerated above, are matters for the " sound legal " discretion of the State court to which the application for removal is made. It is a discretion, however, the exercise of which may be reviewed by this court, and it is the only matter in the record which this court can review.

On this we beg to submit—

1. If the question of transfer was rightly decided there is an end of it.

2. If the question of transfer was erroneously decided and there is another question broad enough to sustain the judgment there is still an end of the question.

The question of the probate of the will was exclusively of State jurisdiction, being one not delegated by the

Constitution to the judicial power, and at least not conferred upon the United States courts by law. This court, then, does not review it.

See U. S. Const., Amendment X.
See Murdock *vs.* City of Memphis, 20 Wallace, p. 590.

If this be so the question of transfer in the latter case becomes unimportant.

Before the final hearing in the probate court on the application for removal, the plaintiff in error applied to the circuit court of the United States in New Orleans for a mandamus to compel the State judge to transfer the cause, which was refused.

The judge of probate, in the opening of his opinion, (Rec., p. 38, fol. 119,) says: "I have already decided that "the cause cannot be removed to the circuit court of the "United States, that court having itself decided it was "without jurisdiction over the main subject-matter, viz., "the probate of a will and the rescission and nullity of that "probate." The next sentence employed by Judge Collins shows that the counsel of plaintiff in error had urged the judge of probate still to send the matter to the circuit court, in spite of that court's decision on their application for a mandamus that it had no jurisdiction of the matter. This extraordinary demand the probate judge, of course, refused.

The judgment of the circuit court denying the mandamus, which was concurred in by Justices Bradley and Wood, is to be found in the record, at pages 43 to 46.

It was delivered at the May term of the U. S. Circuit Court, in New Orleans, 1870; consequently more than five years ago.

Bradley, J., in delivering the opinion of the circuit court

in the case of Fuentes *vs.* Gaines, which was an application for an injunction to stay proceeding in the circuit court while the State courts were engaged with the probate question, said:

"I am referred to the opinion of the court delivered in "May term, 1870, upon an application of Mrs. Gaines to "remove into this court proceedings instituted in the "second district court of the parish of Orleans, by "Fuentes and others, for the revocation of the probate of "the will of 1813.

"We then held that we had not probate jurisdiction, and "could not entertain the questions which were raised in "that case. Such is still my opinion."

See Wood's Reports, p. 116.

The judgment of the circuit court of the United States in Louisiana on the application of plaintiff in error for a mandamus settled the question raised here between these parties, who are the same that were in litigation then.

See our brief of this term, p. 11, *et seq.*
See Voorhies *vs.* The Bank of the United States, 10 Peters, 474.

G. A sufficient and conclusive answer to the first assignment of error on the subject of the non-removal of the case from the State to the circuit court is found in the opinion of this court, Gaines *vs.* The City of New Orleans, decided in 1868. There the court declared that the defendants could not attack the will in the United States courts, for want of jurisdiction, and plainly indicated to the defendants that the court in which the will had been probated was the proper tribunal in which to attack it and bring this action of revocation. This court then said:

"*The attempt to impeach the validity of this will* shows "the importance attached to it by the defence in determining the issue we are now considering. BUT THE WILL "CANNOT BE ATTACKED HERE. When a will is duly probated by a State court of competent jurisdiction, *that* "*probate is conclusive* of the validity and contents of the "will *in this court.*

"But why, if the will is invalid, has the probate of it "rested for twelve years unrecalled, when express liberty "was given by the supreme court of Louisiana for any one "interested to contest it in a direct action with the complainant? If with *this clear indication of the proper* "*course to be pursued the probate of the will still remains* "*unrevoked*, the reasonable conclusion is, the will itself "could not be successfully attacked. Be this as it may, "*while unrevoked* it is the law of this case, and so this "court held in Gaines *vs.* Hennen."

Gaines *vs.* New Orleans, 6 Wall., 703–'4.

The defendants being thus plainly informed and advised by this court as to the proper tribunal in which relief could be obtained, went into the probate court; and yet, when the proceeding for revocation was brought there, application was made for its removal to the United States courts, in palpable and manifest disregard of the opinion of this court, above quoted.

We but obeyed the spirit and letter of the direction of this court, as shown in the above extract from the opinion in 6 Wallace, when we brought this proceeding for revocation. And the direction was given, no doubt, because the defendants were denied the right to attack the will in this court. Certainly the doctrine of removal of suits to the courts of the United States cannot apply to a proceeding in

which the courts of the United States, after denying the parties a hearing for want of jurisdiction, in the same opinion indicate that a proceeding for the purpose so denied may be brought *only* in a State court of a peculiar and limited jurisdiction. The court will observe that the denial of the right to attack the will in the courts of the United States in the decision in 6 Wallace was made under circumstances of hardship to the defendants, for the reason we will now give, which reason will explain also the inquiry of the court "Why, if the will is invalid, has the probate of it "rested for twelve years unrecalled?" &c.

The will was probated Feb. 23, 1856, by the State court, with express reservation of the right of any one to contest the will with Mrs. Gaines in a direct action, "*or by way of* "*answer or exception, whenever the will is set up as a mu-*"*niment of title.*"

11 La. Annual R., suc. of Clark, pp. 134–'5.

In 1857 various bills in equity were filed in the United States courts, in which the will thus probated was set up as a muniment of title, and the defendants, by way of *answer* therein, sought to contest the validity of the will; and in this *they were then successful* before the circuit court of the United States for the district of Louisiana, and obtained final decrees in their favor.

This was in 1858. These cases were not heard by this court on appeal until after TEN YEARS had elapsed, to wit, in 1868, when the decrees of the circuit court were reversed. They will be found reported in 6 Wallace, pages 642 and 719.

This accounts for ten years of the apparent delay in bringing the suit of revocation in the probate court.

Up to the period of the decision in 6 Wallace the de-

fendants supposed they might attack the will whenever set up against them as a muniment of title in any court, and in point of fact had successfully overthrown it, as we have shown above.

But, as we have observed, the opinion in 6 Wallace, in the very same paragraph in which it denies the defendants the right to attack the will in the courts of the United States, carefully and plainly points them to the court in which the order of probate was granted as the proper and only tribunal possessed of jurisdiction of a suit to impeach the validity of the will therein admitted to probate.

When the opinion reported in 6th Wallace was rendered, the local prejudice act for the removal of causes was in existence. Now, is it reasonable to suppose that this court would have rendered an opinion declining to allow an attack on the will here for want of jurisdiction, if jurisdiction could have been given subsequently by mere change in the mode of bringing the question before the court, *i. e.*, by application for removal under the local prejudice act. In other words, if the courts of the United States have no probate jurisdiction whatever, can jurisdiction over a probate matter be given to them by virtue of any proceedings for removal taken under the local prejudice act?

The jurisdiction of the courts of the United States must be derived from express grant, and cannot be founded on implication or inference.

Before jurisdiction could thus be wrested from the courts of probate, and be thus indirectly conferred upon the courts of the United States, the jurisprudence established by the following decisions of this court and of other tribunals would have to be overthrown:

Case of Broderick's will, 21 Wall., 503.
Gaines *vs.* New Orleans, 6 Wall., 703.

Gaines *vs.* Chew & Relf, 2 Howard, 619.
Fonvergne *vs.* City of New Orleans, 18 How., 473.
Tarver *vs.* Tarver, 9 Peters, 179.

See also—

Adams *vs.* Preston, 22 Howard, 488.
Florentine *vs.* Barton, 2 Wall., 216.
Thompson *vs.* Tolmin, 2 Peters, 166.
Osgood *vs.* Breed, 12 Mass., 533.
Gelston *vs.* Hoyt, 3 Wheaton, 316.
Tompkins *vs.* Tompkins, 1 Story, 552.
Armstrong *vs.* Lear, 12 Wheaton, 175.
Laughton *vs.* Atkins, 1 Pick., 541.
Inh'ts Dublin *vs.* Chadbourne, 16 Mass., 441.
Lalanne Heirs *vs.* Moreau, 13 La., 436.
Lewis' Heirs *vs.* His Executors, 5 La., 394.
Derbigny *vs.* Pierce, 18 La., 551.
Graham Heirs *vs.* Gibson, 14 La, 149.
Box *vs.* Lawrence, 14 Texas, 545.

The second assignment of errors of counsel of plaintiff in error is on pages 12 and 13 of their brief.

This goes to the ruling of the court below on the question of *res judicata*.

The plaintiff in error averred that her status as heir and legatee of Daniel Clark was drawn in question in the probate court, whereas it had already, as she pretended, been decided and fixed by judgment of the United States courts.

See Rec., pp. 17 and 67.
See opinions on this point of Collins, J., Rec., p. 42, top, and Rec., p. 162, fol. 574.
See opinion of supreme court of Louisiana, Rec., pp. 192 to 195, folios 696 to 705.

From these references it will be seen that the question of *status* was expressly excluded from the opinions and decrees of the Louisiana tribunals in these proceedings.

If, then, the question of *status* has ever been so decided by the courts of the United States so as to form *res judicata*, it is not drawn into controversy here.

The sole prayer of the petitioners is to have recalled the probate of Clark's will, obtained, as they allege, by fraud and through error.

See Record, page 3.

Whether Gaines be a legitimate child of Daniel Clark or not is a matter not now in controversy; if she be such, she is the heir of her father, will or no will.

In the case of Gaines *vs.* Relf, (12 How., p. 539,) it was decided to have been proved that Gaines' mother was not and could not have been the wife of Daniel Clark.

It will be remembered by the court that in the suit just quoted in 12 Howard the plaintiff in error here expressly renounced her claim as universal heir and legatee under the supposed will of 1813, and rested simply on her claim as child of Daniel Clark, and consequently, under Louisiana law, a forced heir.

See Records of this Court for the year 1851, volume VI, December Term, 1851, (No. 3,) page (in ink) 5330; page in print of the Record, 85; amended bill filed November 28, 1848.

After that decision in 12th Howard Mrs. Gaines procured the probate of a supposed lost or destroyed last will of Clark, in which he spoke of her as his daughter; with

this probate as an additional means of proof, she came again before the court, and, in Gaines *vs.* Hennen, (24 Howard, p. 615,) it was decided in the evidence that Gaines was the legitimate daughter of Clark.

The case of Gaines *vs.* New Orleans, (6 Wallace, 718,) gave a similar judgment as in Gaines *vs.* Hennen, and reviews the evidence again.

In neither of these cases was the will in controversy; it was only an instrument of evidence.

"A general principle of the doctrine of *res adjudicata*, "applying alike to all its divisions, is that it relates only "to matters necessarily entering into an adjudication, non-"essentials not working an estoppel."

Bigelow on Estoppel, 22; read what follows there. See same, p. 32, foot.

As to conclusive character of judgments of courts of probate, see same, pages, 160, 161, 175.

It must be remarked that the exception of *res judicata* is claimed to apply, at all events, only to eight of the parties named, (see brief of plaintiff in error, p. 13,) and not to the sixty-eight other parties.

The decrees invoked as *res judicata* are those rendered in pursuance of the decisions in 6 Wallace, 642. Yet we have already shown that this court in that case expressly declined to entertain the suit, for want of jurisdiction, so far as it set up an attack by the defendants upon the will, and remitted the parties by indication to the probate court for relief. There was, therefore, no decision by this court touching the will or its probate, the revocation of which

constitutes the only object of the suit by these defendants in error.

We may observe, also, in this connection, that in order to maintain the plea of *res judicata* under the civil code of Louisiana it is essential that "the thing demanded must "be the same."

Civil Code of La., art. 2264.

Here the thing demanded is not the same as to any of the parties. Take, for example, the case of the City of New Orleans. The decision against the city, reported in 6 Wallace, p. 642, was rendered in suit No. 2695 of the circuit court, on a bill to recover 135 acres of land. The city answered that it had possession of only five vacant half squares of the land in question, upon one of which a draining machine was situated.

Now, other parties are sued for this 135-acre tract.

See bill in Record at p. 169, paragraph 4.

And the city of New Orleans is sued for two other portions of land of small value.

See same bill in Record at pages 169, paragraph No. 1, and page 171, paragraph No. 8.

The third assignment of error of the counsel of plaintiff in error is on pages 13 and 14 of their brief.

This reiterates the exception taken, at the trial, of plaintiff in error to the admissions of the answers of Relf and Chew.

The exception is discussed and overruled in the opinion of the supreme court of Louisiana, (see Record, pp. 196 to

198,) which we look upon as a complete vindication of the ruling of the court of probate in admitting the evidence.

In the case of Gaines *vs.* Chew *et al.*, (2 Howard, p. 646,) this court said with regard to the answers of Relf and Chew: "We think, under the circumstances, the com- "plainants are entitled to full and explicit answers from "the defendants in regard to the above wills. These an- "swers being obtained, may be used as evidence before "the court of probate to establish the will of 1813 and re- "voke that of 1811."

The plaintiff in error did not choose to employ the answers when obtained, but they did not on that account cease to be good evidence, and were properly admitted when offered by the counsel of Fuentes in the probate court. The cause was between the same parties on both sides, or those claiming in privity with them.

Will this court entertain error on a question of admissibility of evidence in a State court?

The fourth assignment of errors of the counsel of plaintiff in error is on page 14 of his brief.

The assignment mistakes the judgment of the supreme court of Louisiana.

The question of the status of the plaintiff in error was not directly involved.

See prayer of petition, Rec., p. 3, fol. 8.

The suggestion on page 26 of the brief of plaintiff in error that the Louisiana probate and supreme courts passed upon the *status* of plaintiff in error is distinctly contradicted by the repeated assertions of these tribunals.

And we have shown in our answer to the second assignment of plaintiff in error that nothing but the question of probate of a will, and not that of status, was decided.

In the brief of the plaintiff in error, on page 26, in support of the fourth assignment of error, it is argued that the supreme court of Louisiana did not except the status of Mrs. Gaines from the decree, because it affirmed the *judgment* of the lower court which passed upon the issue of legitimacy, &c. Precisely the contrary of this statement is true. The decree of the supreme court simply affirmed *the judgment* of the lower court.

Rec., p. 207.

The *judgment* of the probate court thus affirmed reads as follows:

JUDGMENT.

JOS. FUENTES *et als.*
vs.
MRS. MYRA C. GAINES. } *No.* 32729.

For the reasons assigned in the written opinion of the court this day delivered and on file, it is ordered, adjudged, and decreed that the will purporting to be the will of Daniel Clark, and to be dated July 13th, 1813, as set forth in the petition and suit filed by Myra Clark Gaines on the (18th) eighteenth January, 1855, in the record and matter of the succession of said Daniel Clark, No. 8646 of the docket of the second district court of New Orleans, be revoked and declared invalid, and that the probate thereof as obtained on said petition be annulled and recalled as absolutely null and of no effect.

It is further ordered that the defendant be condemned to pay the costs of this suit.

Judgment rendered Dec. 4, 1871.

Judgment signed Dec. 23, 1871.

T. WHARTON COLLINS, *Judge.*

Thus it is seen that not one word is said about the legitimacy or illegitimacy of the plaintiff in error in the judgment of either court.

It is true that the defendants in error in the petition filed in the probate court, after attacking the will and the order of probate, did proceed to say that if it should appear that the pretended will had been made and left by Clark it would be *a void will*, under the prohibitory provisions of the law of Louisiana touching bequests to illegitimate children of a certain class.

This petition was carefully scrutinized by the circuit court of Louisiana when the application was made by the plaintiff in error for a mandamus to order the removal of the case from the State to the circuit court, and in denying the mandamus the circuit court said:

"It is said in argument that the petition of Fuentes and "others puts in issue the legitimacy of Mistress Gaines, "as well as the validity of the will of Daniel Clark. If "this were so, we do not think it would give this court "jurisdiction. *But an examination of the petition shows "that its purpose, and only purpose, is to obtain judgment "revoking the will of Daniel Clark, and recalling the "decree of probate.*

"The grounds on which this is asked are: (1.) That the "said will never existed as a will; that the testimony on "which it was admitted to probate was false; and that "Mistress Gaines being the illegitimate child of Clark had "no capacity to receive or inherit, and therefore Daniel "Clark did not, and could not, have made a will in her "favor.

"*The only issue raised by the petition is on the validity "of the will and the probate thereof, and the only decree "which the court would pronounce would be on (one) either*

" *affirming or denying the validity of the will, and con-*
" *firming or revoking the probate thereof.*"

Opinion of Circuit Court, Record, p. 46.

In the case of Fuentes *vs.* Gaines, in which application was made for an injunction to restrain proceedings in the circuit court pending the trial of the probate suit, Mr. Justice Bradley, referring to the above opinion refusing a mandamus to order the removal of the proceeding into the circuit court, said : " *We then held that we had not probate* " *jurisdiction and* COULD NOT ENTERTAIN THE QUESTIONS " WHICH WERE RAISED IN THAT CASE. *Such is still my* " *opinion.*"

Wood's Circuit Court Rep., p. 116.

Thus we have established clearly and judicially the probate character of this proceeding. When it is remembered that the opinion and decision of the circuit court of the United States, thus reaffirmed by Mr. Justice Bradley, and from which the foregoing extract is taken, was rendered in a contest between the parties now litigant before this court, having for its object the removal of the proceeding into the circuit court, which decision has become final by the lapse of more than five years, (as we have shown above,) it would seem to present a conclusive reply on this branch of the case.

The fifth assignment of error of the counsel of plaintiff in error is on pages 14 and 15 of their brief.

No argument is offered on this in the brief of counsel of plaintiff in error, and the assignment is already discussed in what we have said above.

Condensed, the assignment presents this point: That the supreme court of Louisiana by affirming the decree of

the probate court had in fact overruled the pleas of *res judicata* as to *status*, and so denied Mrs. Gaines the status given her by the Supreme Court of the United States.

We have already shown from the petition and opinion of the circuit court of the United States that the *status* of the plaintiff in error was not properly involved. We desire now to show from an examination of the *opinion and conclusions* of the supreme court of Louisiana, *first*, that they did not consider the question of status was involved; and, *second*, that the court did not pass upon it, if it was. The supreme court of Louisiana said:

"We deem it as unnecessary to pass upon the other plea "of *res judicata* based upon the supposition that the "Supreme Court of the United States has decided and fixed "the *status* of Myra C. Gaines in Gaines *vs.* Hennen, &c. "If it be true that the Supreme Court of the United States "have decided the question relative to her *status*, independ- "ently of the will of 1813, that august tribunal will no "doubt adhere to that opinion. *But we do not consider* "*that question properly involved in this suit.*"

"It is not necessary to pass upon most of the bills of "exceptions taken in this case, as they relate to evidence "affecting the *status* of the defendant, *which we do not con-* "*sider necessary to decide, in consequence of the conclu-* "*sion arrived at on other questions involved in this con* "*troversy.*"

Record, page 194.

We now direct attention to the "other questions," and conclusion thereon, referred to in the foregoing quotation. They will be found at the close of the opinion of the State supreme court in these words:

"We have arrived at the following conclusions: That "the evidence does not rebut the presumption of law that

" the will was destroyed by Clark himself, the will having " been last seen in his possession; that in establishing a " lost will all the essentials of a will must be proved, and " in this case one of the essentials, to wit, a date, has not " been proved; that two credible persons, who have often " seen the testator write and sign, are necessary to prove " an olographic will, and the witnesses in this case are " not shown to have had any knowledge of the handwriting " of the testator.

" It is therefore ordered, adjudged, and decreed that the " judgment of the court *a quâ* be affirmed, with costs of " appeal."

Record, page 207.

These *conclusions* of the opinion of the supreme court of the State place the rejection of the will and rescission of the order of probate solely upon the failure of the proof to show a compliance with the laws of the State in regard to the proof of olographic wills, and the failure of the proof to overcome a presumption of the law.

The question of the *status* of plaintiff in error was not in any manner passed upon nor considered.

From the manner in which this cause has been brought before this court, *i. e.*, considering the record brought up and the assignments of errors thereon made in this court, the merits of the controversy on the evidence adduced are not opened here for discussion or consideration.

It is proper to observe, however, in reply to a statement in the brief for plaintiff in error that no new testimony has been offered, to say that there was much new testimony of a very important character on the subject of the pretended will of 1813. We will give one or two illustrations.

For example, there is in the record a letter of Etienne Mazureau, a distinguished lawyer of the State of Louisiana, which in all cases heretofore tried was simply an exhibit to the deposition of Dan'l W. Coxe, and seems never to have had the force of evidence for the reason stated by the reporter in the statement of the case.

See Gaines *vs.* New Orleans, 6 Wallace, p. 677.

But in the present case this letter was offered, and received after much contest, as legal evidence in this case.

See Bill of Exceptions, R., p. 126, and opinion of Supreme Court, R., p. 195.

This letter of Mazureau is the key that solves the entire mystery of this case so far as it relates to the pretended will of 1813, and we commend it to the perusal of the court. It will be found in this record, pages 124–126.

Mr. Mazureau was, in the year 1813, the attorney-general of the State of Louisiana.

See title page of Martin's Reports, decisions of Supreme Court of Louisiana, old series, vol. 2.

Mr. Mazureau was Clark's legal adviser, and his letter shows that, although Clark desired to make a will in Myra's favor, he gave up the idea on Mazureau's advice, and provided for her by confidential trusts.

There are also in evidence the answers of Relf and Chew, declaring solemnly they never saw nor had any knowledge whatever of any will of Daniel Clark, except that of 1811, either before, or at the time of, or subsequently to the death of Clark.

In conclusion, we beg to bring to the attention of the

court the evidence furnished by this record of the patient and protracted and exhaustive labor with which the trial of this case has been conducted in the State tribunals, and that a conclusion and judgment was reached in the State courts only after a fair trial and hearing of both parties. There is not in the brief filed by plaintiff in error one word of complaint that the trial had was not full and fair. In the spring of 1869 this tribunal reversed decrees which had been rendered in our favor ten years before, and declined to entertain the attack made by us on the will. In less than six months afterwards, to wit, on the 27th May, 1869, in pursuance of the indication as to the proper court in which the will could be impeached, (see 6 Wall., 703,) the defendants in error filed their petition in the probate court of New Orleans, praying that judgment be rendered revoking the pretended will, and recalling the decree of probate thereof as absolutely void and of no effect in law.

Some idea of the persistent and unflagging character of the defences then interposed may be inferred when it is considered that, although the court in question was one of exclusive probate jurisdiction and held its sessions continuously without vacation, a judgment was not finally obtained until December, 1871, after a contest extending over a period of two and a half years. The record shows that the trial of the cause was delayed by exceptions and defences of a purely technical nature, but that finally, for the first time in the history of the Gaines cases, the contestants were brought face to face in open court upon the one issue of the will and the validity of the decree of its probate, and had that one issue fully heard, fully argued, and fairly decided.

The plaintiff in error, throughout the entire and protracted litigation in the probate court, was represented by eminent and able counsel, the Hon. E. T. Merrick, ex-

chief-justice of the supreme court of the State, and W. R. Mills, Esq.

For the first time in the history of the case was the evidence in regard to the will of 1813 segregated from the vast mass of testimony and pleadings, exhibits, and documents which had accumulated, volumes in size, through antecedent years of litigation, where the claim of Mrs. Gaines as the heir-at-law of Clark was involved. Much time and great and patient labor have been required to prepare and try this case under these circumstances. But these exactions of time and labor have been fairly met, and the defendants in error have finally obtained, at the hands of the only tribunal competent to examine the question, a decree of revocation of the order of probate granted in 1856.

While the defendants in error were conducting the proceedings for revocation of the order of probate in the State court, the plaintiff in error was vigorously pushing to conclusion the suits brought by her in the circuit courts of the United States in the district of Louisiana. Application was then made by the defendants in error to the circuit court for an injunction to restrain further proceedings in the circuit court until a decision could be had in the probate court. In passing upon this application, Mr. Justice Bradley held: "I think I am bound in all the cases to "proceed if the complainant shall so elect; and *if the de-* "*fendants are successful in procuring a revocation of the* "*probate in the parish court before the closing of testi-* "*mony in this court,* THEY WILL THEN HAVE THE BENEFIT OF "IT, otherwise they must depend on a contestation of the "will in the causes pending here."

Fuentes *vs.* Gaines, Wood's R., pp. 117 and 118.

The contest for the revocation of this order of probate, it thus appears from the record, and from the published reports of decisions of the circuit court, was all the while conducted in the State court under the very eye of the circuit court of the United States in Louisiana, with its avowal of want of jurisdiction "to try the issues presented in the case," with its refusal, by judgment contradictorily rendered, to order the removal of the cause, and finally, with the encouraging assurance, judicially given, that the defendants, if successful in procuring the order of revocation, "should "have the benefit of it."

These decisions and opinions of the circuit court sitting in Louisiana, above quoted and referred to, are in accord with the opinions of this court pronounced in the cases of Gaines *vs.* Relf & Chew, (2 Howard, p. 646,) and Gaines *vs.* New Orleans, (6 Wallace, 703.)

And now having been successful in setting aside the order of probate, in a proceeding begun and conducted in accordance with the views of the courts of the United States, as above expressed, we are confident that these defendants in error will not be deprived of the benefit of the contest in the probate court, and they accordingly pray that the writ of error be dismissed.

JAMES McCONNELL,
DURANT & HORNOR,
Of Counsel for Detf's in Error.

JANUARY 20, 1876.

La ~~Code~~ - ~~p~~ -
- Revised ~~Statutes~~ - p 401 -
- 1870 -